No. 17-1094	
Title:	Nutraceutical Corporation, Petitioner v. Troy Lambert
Docketed:	February 5, 2018
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(15-56423)
Decision Date:	September 15, 2017
Rehearing Denied:	November 3, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Feb 01 2018	Petition for a writ of certiorari filed. (Response due March 7, 2018) Petition Appendix Certificate of Word Count Proof of Service
Feb 15 2018	Waiver of right of respondent Troy Lambert to respond filed.
Feb 28 2018	DISTRIBUTED for Conference of 3/16/2018.
Mar 07 2018	Response Requested. (Due April 6, 2018)
Mar 14 2018	Motion to extend the time to file a response from April 6, 2018 to June 1, 2018, submitted to The Clerk. Main Document
Mar 27 2018	Motion to extend the time to file a response is granted in part and the time is extended to and including May 14, 2018.
May 14 2018	Brief of respondent Troy Lambert in opposition filed. Main Document Certificate of Word Count Proof of Service
May 23 2018	Reply of petitioner Nutraceutical Corporation filed. Main Document Certificate of Word Count Proof of Service
May 29 2018	DISTRIBUTED for Conference of 6/14/2018.

Jun 18 2018	DISTRIBUTED for Conference of 6/21/2018.
Jun 25 2018	Petition GRANTED.
Jul 16 2018	Joint motion for an extension of time not accepted for filing. (July 23, 2018 - Corrected motion to be submitted.)
Jul 24 2018	Joint motion for an extension of time to file the opening briefs on the merits filed. **Main Document** **Proof of Service**
Jul 30 2018	Joint motion to extend the time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 20, 2018. The time to file respondent's brief on the merits is extended to and including October 1, 2018.
Aug 20 2018	Brief of petitioner Nutraceutical Corporation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 20 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service**
Oct 01 2018	Brief of respondent Troy Lambert filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 09 2018	SET FOR ARGUMENT ON Tuesday, November 27, 2018
Oct 15 2018	Record requested from U.S.C.A. 9th Circuit.
Oct 19 2018	CIRCULATED
Oct 31 2018	Reply of petitioner Nutraceutical Corporation filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 27 2018	Argued. For petitioner: John Hueston, Los Angeles, Cal. For respondent: Jonathan A. Herstoff, New York, N. Y.

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Party name: Troy Lambert

No. _____

In The
Supreme Court of the United States

NUTRACEUTICAL CORP.,

Petitioner,

v.

TROY LAMBERT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(f) establishes a fourteen-day deadline to file a petition for permission to appeal an order granting or denying class-action certification. On numerous occasions, this Court left undecided whether mandatory claim-processing rules, like Rule 23(f), are subject to equitable exceptions, because the issue was not raised below. *See, e.g.*, *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13, 18 n.3, 22 (2017). That obstacle is not present here.

The question presented is: did the Ninth Circuit err by holding that equitable exceptions apply to mandatory claim-processing rules and excusing a party's failure to timely file a petition for permission to appeal, or a motion for reconsideration, within the Rule 23(f) deadline?

As the Ninth Circuit acknowledged below, its decision conflicts with other United States Circuit Courts of Appeals that have considered this issue (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is Nutraceutical Corporation ("Nutraceutical"). In the proceeding below, Nutraceutical was the defendant-appellee. The parent corporation of Nutraceutical is HGGC, LLC. No publicly held company owns 10% or more of Nutraceutical's stock.

The Respondent is Troy Lambert. In the proceeding below, Lambert was the plaintiff-appellant. He filed a class action on behalf of all others similarly situated.

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PETITION FOR A WRIT OF CERTIORARI

Nutraceutical Corporation ("Nutraceutical") respectfully petitions this Court for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 870 F.3d 1170, and reprinted at Appendix 1. The District Court's order granting Nutraceutical's motion to decertify the class is not published in the *Federal Supplement*, but it is available at 2015 WL 12655388, and reprinted at Appendix 52. The District Court's order denying Respondent Troy Lambert's motion for reconsideration is not published in the *Federal Supplement*, but it is available at 2015 WL 12655392 and reprinted at Appendix 27. The Ninth Circuit's order denying Nutraceutical's petition for rehearing en banc is reprinted at Appendix 67.

JURISDICTION

The Ninth Circuit entered judgment in this case on September 15, 2017. Appendix 1. On November 3, 2017, the Ninth Circuit denied Nutraceutical's petition for rehearing en banc. Appendix 67. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23(f) provides:

> (f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Federal Rule of Appellate Procedure 26(b)(1) provides:

> (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> > (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
> >
> > (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

INTRODUCTION

This case presents a recognized circuit split, as well as an important and frequently occurring issue that this Court has not yet had the opportunity to address: whether equitable exceptions apply to non-jurisdictional claim-processing rules. On numerous occasions, this Court had to leave that issue undecided because it was not properly raised below. *See, e.g., Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13, 18 n.3, 22 (2017); *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004). This case presents the proper vehicle to address this important question.

The specific rule at issue in this case is Federal Rule of Civil Procedure 23(f), which establishes a fourteen-day deadline to file a petition for permission to appeal an order granting or denying class-action certification. In the decision below, the Ninth Circuit found that Rule 23(f) is not jurisdictional, and then broadly held that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations." *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1177 (9th Cir. 2017). Relying on that holding, the Ninth Circuit excused Respondent Troy Lambert's failure to timely file a Rule 23(f) petition or a motion for reconsideration within the fourteen-day window.

The Ninth Circuit acknowledged that its decision conflicts with other United States Circuit Courts of Appeals. *Id.* at 1179 ("We recognize that other circuits would likely not toll the Rule 23(f) deadline in Lambert's

case."). In fact, every other circuit to consider this issue – *i.e.*, the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits – has held that the Rule 23(f) deadline is "strict and mandatory." *See, e.g.*, *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (collecting cases).

The Ninth Circuit's decision is also at odds with this Court's precedent. This Court has held, and reaffirmed on numerous occasions, that mandatory claim-processing rules are "unalterable" and "mandatory" if a party properly raises them. *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017); *see also Eberhart v. United States*, 546 U.S. 12, 19 (2005) ("These claim-processing rules [] assure relief to a party properly raising them.") (per curiam).

The decision below also conflicts with Federal Rule of Appellate Procedure 26(b)(1), which states that courts "may not extend the time to file . . . a petition for permission to appeal." Fed. R. App. P. 26(b)(1). As the Second, Third, and Tenth Circuits have recognized, this rule expressly prohibits extensions of the Rule 23(f) deadline. *See, e.g.*, *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.") (per curiam); *Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013) (per curiam); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) (per curiam).

Finally, the Ninth Circuit's decision contravenes Rule 23(f)'s purpose. Because interlocutory appeals

are inherently disruptive, expensive, and time-consuming, Rule 23(f) established a "deliberately small" filing window. *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999) ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small."); *see also* Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment). By applying equitable exceptions to Rule 23(f), the Ninth Circuit exacerbated the delay and disruption caused by petitions for permission to appeal.

Despite the importance of these issues, as noted above, this Court has not yet decided whether claim-processing rules like Rule 23(f) are subject to equitable exceptions because the issue was not addressed below. This case is different. It presents a timely opportunity for this Court to resolve an important question of federal procedure and resolve a recognized circuit split.

STATEMENT OF THE CASE

Respondent Troy Lambert ("Lambert") filed the underlying class action against Nutraceutical on March 14, 2013 for alleged violations of California's false advertising and unfair competition laws arising out of Nutraceutical's sale of a dietary supplement. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

The District Court initially certified the class on June 19, 2014. Following the close of discovery, on February 20, 2015, the District Court granted Nutraceutical's motion to decertify.

The District Court decertified the class because Lambert failed to "demonstrate that damages [were] measurable on a classwide basis through use of a 'common methodology' " as required by this Court's decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1430 (2013). Appendix at 56. Among other things, Lambert failed to produce evidence necessary to calculate what class members actually paid – *i.e.*, the average retail price – which he needed to proceed under his "full-refund" damages model. *Id.* at 60-65.

Pursuant to the fourteen-day deadline in Federal Rule of Civil Procedure 23(f), Lambert's deadline to file a petition for permission to appeal the District Court's decertification order was March 6, 2015.

Lambert did not file a petition or a motion for reconsideration by the deadline. Lambert also did not inform the District Court that he intended to file a petition for permission to appeal.

Instead, at a March 2, 2015 status conference, Lambert requested permission to file a "renewed motion for class certification." Appendix at 71. The District Court denied Lambert's request to file a renewed motion for class certification, but acknowledged Lambert could, pursuant to the court's local rules, file a motion for reconsideration and set a March 12 deadline. *Id.* at 73-76. Lambert filed his motion for reconsideration

on March 12, and the District Court denied the motion on June 24.

On July 8, 2015, Lambert finally filed a Rule 23(f) petition for permission to appeal with the Ninth Circuit. The petition was thus filed more than four months late.

On September 16, 2015, a Ninth Circuit motions panel conditionally granted Lambert's petition and instructed the parties "[i]n addition to all other issues the[y] wish to raise in their briefs in the appeal, [to] . . . address the timeliness of this petition." *Lambert*, 870 F.3d at 1175.

The case was then assigned to a Ninth Circuit merits panel (the Hon. Richard A. Paez, Marsha S. Berzon, and Morgan Christen), which heard oral argument on March 9, 2017. On September 15, 2017, the Ninth Circuit issued an opinion holding that Lambert's Rule 23(f) petition was timely and reversing and remanding the District Court's order.

The Ninth Circuit noted that "[u]nder the plain text of Rule 23(f), Lambert's petition would be untimely because it was not filed within fourteen days of the district court's initial order decertifying the class." *Lambert*, 870 F.3d at 1176. Nevertheless, the court held that equitable exceptions applied. The Ninth Circuit reached that decision in three steps:

First, the Ninth Circuit held that Rule 23(f) is a non-jurisdictional claim-processing rule. *Id.* at 1177. Second, the Ninth Circuit joined its sister circuits in

holding that a motion for reconsideration filed in the District Court within Rule 23(f)'s fourteen-day deadline will toll the deadline. *Id.* at 1177-78.

Third, the Ninth Circuit held that equitable exceptions also apply. Citing this Court's decision in *Bowles v. Russel*, 551 U.S. 205 (2007),[1] the Ninth Circuit concluded that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations." *Lambert*, 870 F.3d at 1177.

The Ninth Circuit held that "in determining when equitable circumstances beyond a motion for reconsideration filed within the fourteen day Rule 23(f) deadline can toll that deadline, we look to equitable factors such as whether the litigant 'pursued his rights diligently,' [] whether external circumstances, such as a deadline imposed by the district court, affected the litigant," and "whether [the] litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action." *Id.* at 1178.

---

[1] As explained below, *Bowles* did not decide whether equitable exceptions apply to mandatory claim-processing rules. Even after *Bowles*, this Court has had to "reserve[] whether mandatory claim-processing rules may be subject to equitable exceptions," because the issue was "unaddressed" below. *Hamer*, 138 S. Ct. at 18 n.3, 22.

Applying those factors, the Ninth Circuit held that Lambert tolled the deadline because he "informed the court orally of his intention to seek reconsideration of the decertification order and the basis for his intended filing within fourteen days of the decertification order and otherwise acted diligently, and because the district court set the deadline for filing a motion for reconsideration with which Lambert complied." *Id.* at 1179.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED SPLIT OF AUTHORITY ON THE QUESTION PRESENTED

This case presents a clear and undisputed circuit split. As the Ninth Circuit acknowledged in its decision, "other circuits would likely not toll the Rule 23(f) deadline" in this case. *Id.* The Ninth Circuit's decision conflicts with all seven United States Circuit Courts of Appeals (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh) (the "other circuits") that have considered this issue.

As the other circuits have recognized, the Rule 23(f) deadline is "strict and mandatory" because its purpose is to reduce the inherent disruption caused by interlocutory appeals. *See, e.g.*, *Gutierrez*, 523 F.3d at 192; *see also Gary*, 188 F.3d at 893 ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of

review is deliberately small."); *Fleischman*, 639 F.3d at 31 ("It is well-established that Rule 23(f)'s fourteen day filing requirement is a rigid and inflexible restriction.") (citations omitted).

The other circuits have only adopted one "narrow exception" to the Rule 23(f) deadline – a litigant can "postpone" the time to file a petition for permission to appeal by filing a motion for reconsideration in district court *before* the fourteen-day deadline in Rule 23(f) expires. *Gutierrez*, 523 F.3d at 192-93.

The Ninth Circuit adopted that exception but then departed from the other circuits by holding that Rule 23(f)'s deadline is also subject to broad equitable exceptions. *Lambert*, 870 F.3d at 1177 (holding that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations"). Even if a litigant fails to timely file a Rule 23(f) petition or a motion for reconsideration within fourteen days, the Ninth Circuit held that courts must consider whether (i) the litigant "pursued his rights diligently," (ii) "external circumstances, such as a deadline imposed by the district court, affected the litigant," or (iii) the "litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration." *Id.* at 1178.

None of the other circuits have applied equitable exceptions to the Rule 23(f) deadline or otherwise excused a party's failure to file a petition or motion for

reconsideration within the fourteen-day deadline. Instead, the other circuits uniformly agree that "[a]n out-of-time motion for reconsideration . . . cannot 'restart the clock for appellate review' under Rule 23(f)." *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) (citations omitted); *Gary*, 188 F.3d at 892 ("[I]f the request for reconsideration is filed more than [fourteen] days after the order . . . appeal must wait until the final judgment."); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within [fourteen] days if it is going to toll the [] period within which to seek permission to appeal.").

As the Second Circuit explained in *Fleischman*, a contrary holding "would eviscerate [Rule 23(f)'s] deliberate and tight restriction on interlocutory appeals." 639 F.3d at 31. It would also violate Federal Rule of Appellate Procedure 26(b)(1)'s prohibition against extending the time to file a petition for permission to appeal. *Id.* ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.").

Indeed, the Third, Tenth, and Eleventh Circuits have rejected untimely Rule 23(f) petitions in situations that closely resemble the facts before the Ninth Circuit. In the Third Circuit case, *Gutierrez*, the petitioners filed their Rule 23(f) petition and motion for reconsideration late, however they did the things necessary to obtain equitable tolling under the Ninth Circuit's decision. They had requested, by letter, an extension of time to file a motion for reconsideration

within ten days of the order denying certification, the district court granted the request, and they filed a Rule 23(f) petition within ten days of the order denying their motion for reconsideration. *Gutierrez*, 523 F.3d at 190-91.

In contrast to the Ninth Circuit, the Third Circuit rejected the untimely petition. Even assuming equitable exceptions could apply, a decision the court did not reach, the Third Circuit explained that Rule 23(f) "is clearly a strict and inflexible time limit" that cannot excuse petitioner's mistaken reliance on the district court's scheduling order. *Id.* at 198 ("Petitioners cannot use the District Court's approval of the extension of time to save their untimely petition.").

In addition, the Third Circuit rejected the Ninth Circuit's reasoning that a letter filed in district court indicating the petitioner's intent to file a motion for reconsideration could toll the Rule 23(f) deadline. The Third Circuit held that allowing a mere letter to serve that purpose "would be inconsistent with the generally rigid, strict approach courts have taken when construing the Rule 23(f) time limit." *Id.* at 195 n.7.

The Eleventh Circuit came to a similar conclusion in *Jenkins v. BellSouth Corp.*, 491 F.3d 1288 (11th Cir. 2007). There, the court held that a Rule 23(f) petition was untimely because the plaintiffs missed the filing deadline, even though the deadline was on the eve of Thanksgiving Day, the petition was only two days late, the plaintiffs had instructed a courier to file the petition before the deadline, and the district court vacated

and reentered its order to restart the deadline. *Id.* at 1289-92. The court held that the "single opportunity for seeking interlocutory review of the denial of class certification expired on November 22, 2006, and . . . the district court was without the authority to circumvent the [] deadline." *Id.* at 1292.

Similarly, in *Delta Airlines*, 383 F.3d at 1145, the Tenth Circuit rejected a Rule 23(f) petition that was filed only two days late even though the petitioner's counsel had miscalculated the filing deadline by mistakenly relying on the grace period in Fed. R. Civ. P. 6(e) and Fed. R. App. P. 26(c) and, in response, the district court had granted an extension of time to file the petition. The Tenth Circuit held that the district court lacked authority to extend the deadline and petitioner's counsel's ignorance of the rules could not excuse the untimely filing. *Id.* The Tenth Circuit also noted that Federal Rule of Appellate Procedure 26(b) "specifically foreclose[s] appellate courts from granting an extension of time to file a petition for permission to appeal." *Id.*

For the foregoing reasons, the Ninth Circuit's decision presents a clear and undisputed circuit split.

II. REVIEW IS NEEDED TO ESTABLISH A NATIONWIDE RULE ON AN IMPORTANT ISSUE

The question presented is of critical legal and practical significance. As this Court is aware, decisions on class certification can effectively end a lawsuit. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1707-08

(2017). Interlocutory appeals of class certification decisions, however, have profound negative consequences. They are "disruptive, time-consuming, and expensive . . . add to the heavy workload of the appellate courts, require consideration of issues that may become moot, and undermine the district court's ability to manage the class action." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) (citations omitted). Resolution of the question presented will therefore affect the ability of both plaintiffs and defendants to obtain meaningful review of class certification decisions while also deciding the extent to which this type of review can disrupt district court proceedings.

While these issues are significant, the Ninth Circuit's decision raises even broader and weightier concerns. As noted above, the Ninth Circuit did not limit its holding to Rule 23(f). The Ninth Circuit held that equitable tolling applies to any non-jurisdictional deadline. *Lambert*, 870 F.3d at 1177 ("Because the Rule 23(f) deadline is not jurisdictional, equitable exceptions, such as tolling, may apply.").

These types of mandatory claim-processing rules are abundant in the federal rules and procedure. Consider, for example, the sheer number of rule-based deadlines in the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Bankruptcy Procedure. Absent intervention by this Court, the Ninth Circuit's decision will change how all of these claim-processing rules are enforced in the largest circuit in the country.

III. THIS CASE IS THE PROPER VEHICLE TO ADDRESS THIS IMPORTANT ISSUE

This Court has not yet had an opportunity to address whether mandatory claim-processing rules are subject to equitable exceptions. In numerous cases, this Court had to leave that issue undecided because it was not properly presented below.

In *Hamer*, for example, the Court held that the thirty-day limitation on extensions of time to file a notice of appeal in Federal Rule of Appellate Procedure 4(a)(5)(C) was a mandatory claim-processing rule. 138 S. Ct. at 22. The Court "reserved whether mandatory claim-processing rules may be subject to equitable exceptions," however, because the issue was "unaddressed" below. *Id.* at 18 n.3, 22.

Likewise, in *Kontrick* the Court concluded that Federal Rule of Bankruptcy Procedure 4004 is a mandatory claim-processing rule. 540 U.S. at 454. Because the case "involve[d] no issue of equitable tolling or any other equity-based exception," however, this Court did not reach the question of whether claim-processing rules "despite their strict limitations, could be softened on equitable grounds." *Id.* at 457-58; *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 442 n.4 (2011) (not deciding whether a non-jurisdictional rule setting the deadline to appeal a denial of veteran benefits is subject to equitable tolling because the parties did not ask the Court to address that issue).

These obstacles to review are not present here. There is no question the Ninth Circuit concluded that

equitable exceptions apply to mandatory claim-processing rules like Rule 23(f). And there is no question that the Ninth Circuit's decision conflicts with the other circuits. This case presents a timely opportunity for this Court to resolve this important issue.

IV. THE DECISION BELOW WAS INCORRECT

This Court's intervention is also needed because the decision below is wrong. Among other issues, the Ninth Circuit's decision (i) is inconsistent with this Court's precedent; (ii) violates Federal Rule of Appellate Procedure 26(b)(1)'s prohibition against extending the time to file a petition for permission to appeal; and (iii) contravenes the purpose behind Rule 23(f)'s deadline, which was "designed to reduce the risk that attempted appeals will disrupt continuing proceedings," Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment).

A. The Decision Below is Inconsistent with this Court's Precedent

Although this Court has not squarely addressed whether mandatory claim-processing rules are subject to equitable exceptions, its precedent suggests that they are not. This Court has held, and reaffirmed on numerous occasions, that mandatory claim-processing rules are "unalterable" and "mandatory" if a party properly raises them. *Manrique*, 137 S. Ct. at 1271 (2017).

For example, in *Eberhart*, this Court held that Federal Rule of Criminal Procedure 33(b)(2), which establishes the deadline to file a motion for a new trial on any reason other than newly discovered evidence, is a mandatory claim-processing rule. 546 U.S. at 13. The Court held that claim-processing rules are "unalterable on a party's application." *Id.* at 15 (quoting *Kontrick*, 540 U.S. at 456). In other words, "these claim-processing rules [] assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 19.

Importantly, *Eberhart* rejected an argument that claim-processing rules are subject to equitable exceptions when addressing the Court's decision in *United States v. Robinson*, 361 U.S. 220 (1960). In *Robinson*, this Court reversed the Seventh Circuit's ruling that an "excusable neglect" exception applied to untimely notices of appeal. *Eberhart*, 546 U.S. at 17. As *Eberhart* explained, "*Robinson* is correct not because the District Court lacked subject-matter jurisdiction, but because district courts ***must observe*** the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Id.* (emphasis added).

The Court reaffirmed *Eberhart*'s holding in *Manrique*. There, this Court held that a rule requiring a party to file a notice of appeal of an amended judgment is "at least a mandatory claim-processing rule." 137 S. Ct. at 1271. The Court explained that mandatory claim-processing rules, unlike jurisdictional rules, can be forfeited if they are not timely asserted. If a party "properly raise[s] them," however, they are

"unalterable." *Id.* at 1272. Because the Government had timely raised the petitioner's failure to timely file a notice of appeal from an amended judgment, the Court held that the lower "court's duty to dismiss the appeal was ***mandatory***." *Id.* (emphasis added).

In addition, this Court has already decided, in a closely analogous context, that a district court's scheduling order cannot toll an appeal deadline. In 2016, the Court resolved a circuit split by amending Federal Rule of Appellate Procedure 4(a)(4) to clarify that the time to file a notice of appeal may be tolled by the filing of certain post-judgment motions – but only if they are timely filed pursuant to deadlines in the Federal Rules of Civil Procedure. As the advisory committee notes explain, that rule "is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules." Fed. R. App. P. 4 advisory committee's note (2016 Amendment).

As these cases and rules make clear, mandatory claim-processing rules must be enforced if they are properly raised. The Ninth Circuit's holding that equitable exceptions apply to mandatory claim-processing rules is inconsistent with this Court's precedent.

B. The Decision Below Violates the Federal Rules of Appellate Procedure

In addition, the Ninth Circuit's holding violates Federal Rule of Appellate Procedure 26(b)(1). That rule plainly states:

> For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court ***may not extend*** the time to file:
>
> (1) a notice of appeal (except as authorized in Rule 4) ***or a petition for permission to appeal***. . . .

Fed. R. App. P. 26(b)(1) (emphasis added).

The Second, Third, and Tenth Circuits have held that this rule prohibits courts from extending the time to file a Rule 23(f) petition for permission to appeal. *Fleischman*, 639 F.3d at 31 ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal."); *Eastman*, 736 F.3d at 677 (rejecting Rule 23(f) petition because Fed. R. App. P. 26(b)(1) "clearly states that this Court cannot extend the time for filing a petition for permission to appeal"); *Delta Airlines*, 383 F.3d at 1145 (same); *see also Houston v. Lack*, 487 U.S. 266, 281 (1988) (Scalia, J., dissenting) (noting that Fed. R. App. P. 26(b) makes "explicit" that courts are "without power to waive" appeal deadlines, "no matter what the equities of a particular case").

Indeed, Federal Rule of Appellate Procedure 26(b)(1) closely parallels Federal Rule of Criminal Procedure 45(b)(2), which this Court relied upon in *Eberhart* to hold that the mandatory claim-processing rule at issue in that case is "unalterable." As *Eberhart* explained, Federal Rule of Criminal Procedure 45(b)(2)

provides that courts "may not extend the time to take any action under [Fed. R. Crim. P. 33], except as stated" in the rule itself. 546 U.S. at 13. As a result, the Court concluded that the deadline is "rigid" and "unalterable on a party's application." *Id.* at 13, 15, 19. Because Federal Rule of Appellate Procedure 26(b)(1) provides a similar prohibition against extensions of time to file a petition for permission to appeal, this Court's analysis of Rule 23(f) should be the same.

Despite the above, the Ninth Circuit adopted equitable exceptions to the Rule 23(f) deadline that did and, in future cases, will extend the time to file a petition for permission to appeal. Federal Rule of Appellate Procedure 26(b)(1) is a rule promulgated by this Court to "govern procedure in the United States courts of appeals." Fed. R. App. P. 1(a)(1); *see also* 28 U.S.C. § 1292(e). The Ninth Circuit had no authority to abrogate it, and that error warrants correction by this Court.

C. The Decision Below Contravenes the Purpose of an Interlocutory Appeal Deadline

The Ninth Circuit's decision also contravenes the very purpose behind Rule 23(f)'s short deadline. It is well recognized that petitions for permission to appeal, like other interlocutory appeals, are "generally disfavored because they are disruptive, time-consuming, and expensive." *Chamberlan*, 402 F.3d at 959; *Microsoft*, 137 S. Ct. at 1712 (final judgment rule "minimizes

the harassment and delay that would result from repeated interlocutory appeals").

To address these concerns, Rule 23(f) establishes a "deliberately small" fourteen-day filing window. *Gary*, 188 F.3d at 893. The short deadline, as the advisory committee notes explain, is "designed to reduce the risk that attempted appeals will disrupt continuing proceedings." Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment); *see also Jenkins*, 491 F.3d at 1290 ("[T]he [] deadline provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy."); *Chamberlan*, 402 F.3d at 959 ("Although Rule 23(f) expands opportunities to appeal certification decisions, the drafters intended interlocutory appeal to be the exception rather than the rule.").

Departing from its sister circuits, the Ninth Circuit adopted a rule that disregards the concerns noted above and exacerbates the delay and disruption caused by interlocutory appeals. Under the Ninth Circuit's rule, litigants have no incentive to diligently pursue petitions for permission to appeal or motions for reconsideration within fourteen days of a district court's order. Instead, litigants can preserve their right to appeal by simply writing a letter or orally informing the district court that they *intend* to file a motion for reconsideration. District courts will undoubtedly see an influx of such communications and, at the least, this will add months to the already significant delays associated with Rule 23(f) petitions.

Relatedly, the Ninth Circuit replaced a simple, bright-line rule with a vague and impractical standard. Courts can no longer rely on the fourteen-day deadline to quickly deny untimely petitions for permission to appeal. Instead, they will need to scour the district court record, including transcripts, to determine whether the petitioner engaged in any conduct that would entitle him to equitable tolling. This type of review will add even more work to the already heavy court dockets.

It will also create even more uncertainty in the law. As this Court is aware, equitable tolling issues are highly fact-dependent. Under the Ninth Circuit's standard, courts will be forced to decide whether a verbal representation at a status conference, a letter, or a call to the clerk's office, was sufficient to toll the Rule 23(f) deadline. Courts should not "adopt a construction of Rule 23(f) that would regularly require mental gymnastics just for the purpose of giving litigants a second bite at the interlocutory-appellate-review apple." *Carpenter v. Boeing*, 456 F.3d 1183, 1191 (10th Cir. 2006).

Likewise, the Ninth Circuit's reliance on the district court's briefing schedule will require courts to consider whether a petitioner has complied with a district court's schedule. This defeats the very purpose of having a uniform federal deadline. For example, local rules governing motions for reconsideration vary across the district courts. The Central District of California has no deadline, while the Southern District of California requires motions for reconsideration to be filed within 28 days. C.D. Cal. L.R. 7-18; S.D. Cal. Civil

L.R. 7.1(i); *see also* N.D. Cal. Civil L.R. 7-9 (requiring leave of court); D. Ariz. LRCiv 7.2(g) (fourteen-day deadline). Courts must now take the local rules (and their differences) into account.

Finally, and for similar reasons, the standard will inject uncertainty into, and prolong, district court proceedings. Although a district court need not enter a stay when a Rule 23(f) petition is pending, very few district courts will continue to litigate a case and potentially waste judicial resources while an appeal is pending. In this case, for example, district court proceedings were stayed for over *two years*.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY LAMBERT, on Behalf of Themselves and All Others Similarly Situated, *Plaintiff-Appellant*, v. NUTRACEUTICAL CORP., *Defendant-Appellee.*	No. 15-56423 D.C. No. 2:13-cv-05942-AB-E OPINION

Appeal from the United States District Court
for the Central District of California
André Birotte, Jr., District Judge, Presiding

Argued and Submitted March 9, 2017
Pasadena, California

Filed September 15, 2017

Before: Richard A. Paez, Marsha S. Berzon, and Morgan Christen, Circuit Judges.

Opinion by Judge Paez

COUNSEL

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OPINION

PAEZ, Circuit Judge:

Federal Rule of Civil Procedure 23(f) allows a litigant to seek an interlocutory appeal of a district court's order granting or denying class certification. This case is about whether and when the fourteen-day Rule 23(f) deadline may be tolled. In a matter of first impression for this court, we hold that the Rule 23(f) deadline is not jurisdictional, thus equitable exceptions apply. We therefore hold that a motion for reconsideration filed within the Rule 23(f) deadline will toll the deadline. Parting ways with some of our sister circuits, we further hold that additional equitable circumstances may also warrant tolling. As a result, we hold that the Rule 23(f) deadline was tolled here, when counsel for the lead plaintiff, within fourteen days of the district court's decertification order, informed the court of his intention to seek reconsideration, explained his reasons for doing so, and the court set a date for filing the motion with which counsel complied. As for the merits of the Rule 23(f) petition, we hold that the district court abused its discretion in decertifying the class, and therefore reverse and remand.

I.

Lambert purchased "Cobra Sexual Energy," an alleged aphrodisiac dietary supplement manufactured and marketed by Nutraceutical, which the Food and Drug Administration ("FDA") had not approved. Labels on Cobra Sexual Energy boasted that it contained performance-enhancing herbs that would provide users with "animal magnetism" and "potency wood." On the basis of these labels, Lambert believed that the product would enhance his sexual performance and increase the frequency with which he could engage in sexual activity. Had he known that the labels' claims were false, he would not have purchased the product.

According to Lambert, Cobra Sexual Energy violated the FDA's aphrodisiac drug rule because it claimed to increase sexual desire but had not been through clinical testing, as required by 21 C.F.R. § 310.528(c); nor had it received FDA approval, as required by 21 C.F.R. § 310.528(b). The product also failed to display prominently a disclaimer that it had not been evaluated by the FDA, in alleged violation of 21 U.S.C. § 343(r)(6)(C). Moreover, Lambert alleges that the supplement contained an ingredient, yohimbe, which is dangerous for certain persons in certain doses, yet the product label contained no warning of that risk.

Lambert brought a consumer class action for violations of California's Unfair Competition Law ("UCL") (Cal. Bus. & Prof. Code §17200 et seq.), False Advertising Law ("FAL") (Cal. Bus. & Prof. Code § 17500 et

seq.), and Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 et seq.). Lambert brought his class action under Federal Rule of Civil Procedure 23(b)(3), which provides that a class may be certified if "questions of law or fact common to class members predominate over any questions affecting only individual members."

The district court initially granted class certification on the basis of the full refund damages model. That model applies when a product is shown to be worthless, and damages may be calculated by multiplying the average retail price by the number of units sold. In granting class certification, the district court concluded that Lambert put forth a "tenable theory that monetary relief can be ascertained on a classwide basis . . . [that] can be readily calculated using Defendant's sales numbers and an average retail price." The case was subsequently reassigned to a different district judge because the original judge retired. Discovery proceeded and closed. Nutraceutical then filed a motion for decertification of the class, upon which the newly assigned district judge held a hearing.

On February 20, 2015, the district court granted the motion to decertify. The district court found that Lambert's full refund damages model was "consistent with his theories of liability." The court proceeded to find, however, that Lambert "failed to provide the key evidence necessary to apply his classwide model for damages," so common issues did not predominate. The district court required Lambert to provide the actual

average retail price, and Lambert had provided only the suggested retail price.

During a March 2, 2015 status conference, ten days after the order decertifying the class, Lambert informed the court of his intention to file a motion for reconsideration. Counsel explained that he had a damages model and evidentiary support for it. The district court instructed Lambert to file the motion for reconsideration within ten days – i.e., within twenty days in total from the order decertifying the class.

As directed by the district court, ten days later, on March 12, 2015, Lambert moved for reconsideration and asked for recertification. In his motion for reconsideration, Lambert pointed to evidence he had presented in his class certification motion showing that the suggested retail price could be used in conjunction with other evidence to establish the full refund damages model. Lambert also argued for the first time that, as an alternative, he could prove damages through non-restitutionary disgorgement.

The district court denied Lambert's motion for reconsideration three months later. The court rejected Lambert's contention that the average retail price could be calculated from the suggested retail price. The district court also rejected Lambert's non-restitutionary disgorgement argument, reasoning that he waived it by presenting it for the first time in his motion for reconsideration. The court proceeded to hold that even if Lambert had not waived the non-restitutionary disgorgement argument, it was improper under California

law, as restitution should be measured by what the plaintiffs lost, not by what the defendants gained; in other words, the district court held, non-restitutionary disgorgement is not available under California law.[1] In addition to declining to recertify the class, the order set forth a plan for notifying the class regarding decertification.

Within fourteen days of the order denying his motion for reconsideration, Lambert filed in this court a Rule 23(f) petition for permission to appeal the district court's orders granting the motion for class decertification and denying the motion for reconsideration. Upon the filing of that petition, the district court stayed proceedings pending appeal. A motions panel of this court conditionally granted Lambert's Rule 23(f) petition, instructing the parties "[i]n addition to all other issues the[y] wish to raise in their briefs in the appeal, [to] . . . address the timeliness of this petition."

II.

Because the motions panel only conditionally granted the petition and referred the issue of timeliness to this panel, we review de novo its timeliness. *See Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1045-46 (9th Cir. 2015) (reviewing the timeliness of a Rule

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[1] While non-restitutionary damages refer to the defendant's revenues regardless of the plaintiff's relationship to those damages, restitutionary damages refer to the portion of the defendant's revenues over which the plaintiff has some ownership claim. *See Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 941 (Cal. 2003).

23(f) petition after the petition was conditionally granted by a motions panel).

As to the merits of the petition, we review the district court's class decertification ruling for an abuse of discretion. *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 984 (9th Cir. 2015); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1090-91 (9th Cir. 2010). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990)). We review findings of fact in the class certification determination for clear error. *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013).

III.

Rule 23(f) governs interlocutory appeals of "order[s] granting or denying class-action certification." Fed. R. Civ. P. 23(f). The Rule requires that a petition for permission to appeal be filed "within 14 days after the order is entered." *Id.* Rule 23(f) is silent as to the effect of motions for reconsideration on this deadline. Here, the district court decertified the class on February 20, 2015. Lambert's Rule 23(f) petition, however, was not filed until June 24, 2015, fourteen days after the court denied his motion for reconsideration. Under the plain text of Rule 23(f), Lambert's petition would be untimely because it was not filed within fourteen

days of the district court's initial order decertifying the class. In other words, unless an exception applies, Lambert's Rule 23(f) petition would be barred.

To determine whether Lambert's Rule 23(f) petition is timely, we must first determine whether Rule 23(f) is jurisdictional. We conclude that it is non-jurisdictional, and that equitable remedies softening the deadline are therefore generally available. Specifically, we hold that a motion for reconsideration filed within fourteen days of the certification order tolls the Rule 23(f) deadline. We also hold that the deadline can be tolled as a result of additional equitable circumstances. In light of the circumstances in this case, we conclude that the Rule 23(f) deadline was tolled and deem Lambert's petition timely.

A.

We turn first to whether the fourteen-day deadline in Rule 23(f) is jurisdictional. Two Supreme Court cases primarily guide our inquiry. In *Eberhart v. United States*, the Court held that a deadline in the Federal Rules of Criminal Procedure was not jurisdictional because it was a procedural claim-processing rule, as opposed to a rule that delineated the classes of cases or persons within a court's adjudicatory authority. 546 U.S. 12, 15-16 (2005). Several years later, the Court held in *Bowles v. Russell* that deadlines contained in statutes are jurisdictional, but non-statutory deadlines, such as those in the Federal Rules of Civil

or Criminal Procedure, may instead be procedural "claims-processing" rules. 551 U.S. 205, 211-14 (2007).

We have not yet had occasion to apply these cases to Rule 23(f). We have, however, concluded that an immigration regulation requiring a petitioner to file his notice of appeal with the Board of Immigration Appeals within thirty days of the immigration judge's adverse ruling is not jurisdictional because it is regulatory, rather than statutory. *Irigoyen-Briones v. Holder*, 644 F.3d 943, 948-49 (9th Cir. 2011). In *Irigoyen-Briones*, we also noted that the regulatory provision that contained the deadline did not use the word "jurisdiction," and that the Supreme Court had narrowly defined jurisdictional rules as those that remove a court's authority to hear a case. *Id.*

The Third Circuit has had occasion to consider the jurisdictional nature of Rule 23(f). In *Gutierrez v. Johnson & Johnson*, the Third Circuit held that in light of *Bowles*, the Rule 23(f) deadline is not jurisdictional because it is set forth in a rule promulgated by the Supreme Court, not a statute enacted by Congress. 523 F.3d 187, 197-98 (3d Cir. 2008). Other circuits have likewise suggested that the Rule 23(f) deadline is not jurisdictional. *See, e.g.*, *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190 n.1 (10th Cir. 2006) (noting that although the court had previously held Rule 23(f) to be jurisdictional, *Eberhart* "casts doubt" on that notion); *Coco v. Inc. Vill. of Belle Terre, NY*, 448 F.3d 490, 491-92 (2d Cir. 2006) (declining to decide whether Rule 23(f) is jurisdictional, but noting that *Eberhart* "calls the jurisdictional nature of Rule 23(f) into question").

We conclude that under *Bowles* and *Eberhart*, the Rule 23(f) deadline is not jurisdictional because it is procedural, does not remove a court's authority over subject matters or persons, and is in the Federal Rules of Civil Procedure, rather than in a statute.

B.

Because the Rule 23(f) deadline is not jurisdictional, equitable exceptions, such as tolling, may apply.[3] When deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations. *Bowles*, 551 U.S. at 211-14; *Gutierrez*, 523 F.3d at 197 ("The import of this distinction between jurisdictional and non-jurisdictional rules, according to the Supreme Court, is that courts cannot create equitable exceptions to jurisdictional time limits.").

Equitable exceptions arise from the "traditional power of the courts to apply the principles . . . of equity jurisprudence. The classic example is the doctrine of equitable tolling, which permits a court to pause a statutory time limit when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017) (citations and internal quotation marks

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[3] Equitable exceptions include tolling, the unique circumstances doctrine, and others. *See Gutierrez*, 523 F.3d at 197. Because we resolve this case on the basis of tolling, we need not address the unique circumstances doctrine.

omitted). "At bottom, the purpose of equitable tolling is to 'soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having [her] day in court.'" *Rudin v. Myles*, 781 F.3d 1043, 1055 (9th Cir. 2015) (alteration in original) (quoting *United States v. Buckles*, 647 F.3d 883, 891 (9th Cir. 2011)).

C.

All circuits to consider tolling the Rule 23(f) deadline have held that the deadline may be tolled when a litigant files a motion for reconsideration within the fourteen-day deadline.[3] These circuits have reasoned, for example, that "federal courts long have held that a motion for reconsideration tolls the time for appeal, provided that the motion is made within the time for appeal." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d

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[3] *See Gutierrez*, 523 F.3d at 193 (holding that "for the purpose of tolling the time within which to file a Rule 23(f) petition, a 'timely' motion to reconsider is one that is filed within the [fourteen]-day period set forth in Rule 23(f)"); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) (stating that a motion for reconsideration filed within fourteen days of the order granting or denying class certification can toll a Rule 23(f) deadline); *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31-32 (2d Cir. 2011) (same with respect to a motion to amend); *In re DC Water & Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009) (same with respect to a motion for reconsideration); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11th Cir. 2007) (same); *Carpenter*, 456 F.3d at 1190-92 (same); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (same); *Gary v. Sheahan*, 188 F.3d 891, 892 (7th Cir. 1999) (same); *Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1064 n.1 (11th Cir. 2001) (same); *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 836-37 (7th Cir. 1999) (same).

832, 837 (7th Cir. 1999). We agree, and therefore hold, as a baseline matter, that a motion for reconsideration filed within fourteen days of a certification decision tolls the Rule 23(f) deadline.

D.

Of course, in this case, that holding does not end the inquiry. Lambert did not file his motion for reconsideration until *twenty* days after the district court decertified the class. We nonetheless hold that Lambert is entitled to tolling given the history of this case.

Equitable exceptions such as tolling are meant to allow a "a good faith litigant" to have "[her] day in court." *Rudin*, 781 F.3d at 1055 (alteration in original) (internal quotation marks omitted). Accordingly, in determining when equitable circumstances beyond a motion for reconsideration filed within the fourteen day Rule 23(f) deadline can toll that deadline, we look to equitable factors such as whether the litigant "pursued his rights diligently," and whether external circumstances, such as a deadline imposed by the district court,[4] affected the litigant. *Cal. Pub. Emps. Ret. Sys.*, 137 S. Ct. at 2050.

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[4] Petitions for certiorari in the Supreme Court provide a useful analogy. The advisory committee notes to Rule 23(f) provide that "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. In discussing the timeliness of a Rule 23(f) petition, the Eleventh Circuit cited the advisory committee's certiorari analogy. *Jenkins*, 491

We also look, as a factor, to whether a litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action. We are not alone in considering this as a factor. In *McNamara v. Felderhof*, the Fifth Circuit considered whether tolling of Rule 23(f)'s deadline was available when a litigant stated in a court filing that he would seek reconsideration of certification within fourteen days, but did not file a formal motion for reconsideration within that time. 410 F.3d 277, 279-80 (5th Cir. 2005). The Fifth Circuit concluded that a "Trial and Case Management Plan" ("the Plan") could toll the Rule 23(f) filing deadline. *Id.* The Plan specifically sought "revisitation and modification" of the class certification ruling. *Id.* at 280 (internal quotation marks omitted). The Fifth Circuit reasoned that the Plan should be considered a motion for reconsideration for tolling purposes because it "called into question the correctness of the district court's [certification] order." *Id.* The Fifth Circuit also reached this conclusion because it "d[id] not read Rule 23(f) as so limiting in

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F.3d at 1290; *cf. Blair*, 181 F.3d at 833-34 (looking to petitions for certiorari to determine substantive standards for Rule 23(f)). Petitions for certiorari must be filed within ninety days, but may be filed later when a timely petition for rehearing is granted or when the court of appeals entertains an untimely petition for rehearing. Sup. Ct. R. 13(1), (3). By analogy, much like the courts of appeals' authority to affect the Supreme Court's certiorari petition deadline, district courts have authority to affect the Rule 23(f) deadline.

nature."[5] *Id.* The Seventh Circuit has stated, similarly, that it does not "matter[] what caption the litigant places on the motion to reconsider." *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999). Accordingly, an important factor in the tolling analysis is whether the litigant provided, within the Rule 23(f) deadline, notice of the intent to seek reconsideration.

Here, a number of equitable factors support tolling the Rule 23(f) deadline. Lambert clearly conveyed his intention to file a motion for reconsideration seeking recertification on the tenth day after entry of the order decertifying the class. At a status conference, Lambert specifically informed the court of his intention to seek recertification and briefly explained his reasons for doing so. The district court then instructed Lambert to file his motion within ten days, which allotted him twenty days in total from the decertification order. The district court imposed the deadline after an exchange with Lambert's counsel as to whether it was reasonable. Lambert complied, and filed his motion for reconsideration within the period set by the district court. Lambert also filed the Rule 23(f) petition within fourteen days after the district court denied the motion for reconsideration. We hold that because Lambert informed the court orally of his intention to seek reconsideration of the decertification order and the basis for his intended filing within fourteen days of the decertification order and otherwise acted diligently, and because the district court set the deadline for filing a

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[5] *McNamara* ultimately dismissed the petition as untimely because the Plan was not filed within the Rule 23(f) deadline.

motion for reconsideration with which Lambert complied, the Rule 23(f) deadline should be tolled.

We recognize that other circuits would likely not toll the Rule 23(f) deadline in Lambert's case. To the extent other circuits limit Rule 23(f) tolling only to the circumstance where a motion for reconsideration is filed within fourteen days of the certification order, we part ways with them. Other circuits have, for example, held that a motion for reconsideration filed more than fourteen days after a certification order will not toll the deadline even when the district court set or influenced that deadline. In a case in which a district court extended the time to file a motion for reconsideration well beyond the Rule 23(f) deadline, the Third Circuit held that even if a motion for reconsideration is timely for the district court's purposes, it is untimely if it is filed outside of Rule 23(f)'s fourteen-day period. *Gutierrez*, 523 F.3d at 193 n.5 ("[A] motion to reconsider that is filed more than [fourteen] days after an order granting or denying class certification will not toll the time to file a 23(f) petition, even if the motion is 'timely' as defined by the district court's rules or its scheduling order."); *see also Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1289 (11th Cir. 2007) (providing that a district court cannot manipulate the timeliness of a Rule 23(f) petition by vacating and reentering the order denying class certification to make it timely); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) (holding that even if a district court extended the time to file a Rule 23(f) petition, this could not toll the fourteen-day period because the district court lacked

such authority). Similarly, the Third Circuit held that an informal letter to the district court conveying an intent to seek reconsideration of a certification decision filed within fourteen days would not toll the time to file a Rule 23(f) petition, because it did not specifically request certification nor provide reasons why the certification order was wrong. *Gutierrez*, 523 F.3d at 194-95.

The reasons offered by other circuits for strictly limiting the availability of Rule 23(f) tolling, by only allowing for tolling when a motion for reconsideration is filed within the fourteen-day period, are not persuasive.

First, the fourteen-day deadline is for filing a Rule 23(f) petition, not for filing a motion for reconsideration in federal court. Thus, the fourteen-day limitation on tolling has no basis in Rule 23 or any other Rule, but instead is a judicial construct. Litigants have no reason to know that their deadline for filing a motion for reconsideration is effectively fourteen days, rather than whatever the district judge has ordered.

Second, those circuits that have strictly construed the Rule 23(f) fourteen-day deadline have reasoned that Rule 23(f) petitions slow down litigation, are disruptive, and inject uncertainty into class action litigation.[6] For example, the District of Columbia Circuit

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[6] In defining the substantive standards of Rule 23(f), we adopted much of the reasoning discussed by other circuits with respect to timing:

> First, the rule provides a mechanism through which appellate courts, in the interests of fairness, can restore

explained that "[c]ourts generally disfavor interlocutory appeals because they disrupt ongoing trial court proceedings and squander resources." *In re DC Water & Sewer Auth.*, 561 F.3d 494, 497 (D.C. Cir. 2009); *see also Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1064 (11th Cir. 2001) (describing Rule 23(f) petitions as "an avenue of last resort" and "inherently disruptive, time-consuming, and expensive"). The Third Circuit in *Gutierrez* explained that, as a result, the Rule 23(f) deadline is purposely short, to "ensure that interlocutory appeals of class certification decisions are heard and decided in a timely manner, so as not to disrupt the proceedings at the district court level." 523 F.3d at 199 (citing Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment). The Eleventh Circuit has expressed concern that appellate court review generally takes more time than disposition by a trial court. *Shin*, 248 F.3d at 1064. Moreover, the Seventh Circuit explained that because class certification can have major consequences for litigation strategies and

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> equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial. And second, the rule furnishes an avenue . . . [to] take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of law. . . . Interlocutory appeals are generally disfavored because they are disruptive, time-consuming, and expensive.

Chamberlan v. Ford Motor Co., 402 F.3d 952, 957-59 (9th Cir. 2005) (per curiam) (citations and internal quotation marks omitted).

resources, and for the possibility of settlement, allowing for only one short window of review "permit[s] the parties to proceed in confidence about the scope and stakes of the case." *Sheahan*, 188 F.3d at 893.

The premise that Rule 23(f) petitions are disruptive and slow is not universally true and we decline to adopt any hard and fast rule on the basis of such an idea. First, Rule 23(f) petitions do not actually slow down litigation. Rule 23(f) petitions do not automatically stay district court proceedings – only the district court can grant a stay, as it did in this case, and it has discretion whether or not to do so. *See Blair*, 181 F.3d at 835 (suggesting that such stays will be infrequent). Likewise, district courts are bound to experience delay when they are confronted with motions for reconsideration, irrespective of any Rule 23(f) petition. The district court in this case, for example, kept Lambert's motion for reconsideration under submission for more than three months; and statistical studies by the Federal Judicial Center show that median ranges for decisions on class certification motions range from seven to fifteen months. *See* Thomas E. Willging et al., Fed. Judicial Ctr., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 27 (1996), http://www.uscourts.govisites/default/files/rule23_1.pdf. The Third and Eleventh Circuits' suggestions that district courts "ordinarily" rule on motions for reconsideration more quickly than appellate courts, and are "expect[ed]" to do so, are vague and lack persuasive force in light of the evidence to the contrary. *See Gutierrez*, 523 F.3d at 199; *Shin*,

248 F.3d at 1064. We recognize that Rule 23(f) petitions may lengthen litigation. But so do motions for reconsideration of a class action decertification decision when no 23(f) petition is filed, which every circuit to consider the question has treated as valid grounds for equitable tolling.

Third, Rule 23(f) petitions do not uniquely disrupt or inject uncertainty into the litigation. Rule 23(c)(1)(C) allows modifying or amending an order granting or denying class certification up to the time of final judgment, at the discretion of the district court. Fed. R. Civ. P. 23(c)(1)(C)[7]; *see In re DC Water & Sewer Auth.*, 561 F.3d at 497 (noting that district courts may reconsider and modify class certification throughout the case); *Shin*, 248 F.3d at 1064 (explaining that district courts have the ability, "and perhaps even a duty," to reconsider certification as the case progresses). If the district court may change its class certification decision at any time, interlocutory review should not affect the parties' level of certainty as to the finality of that decision, nor should it be unusually or particularly disruptive. *See* Michael G. McLellan, *If at First You Don't Succeed: The Varying Standards Applicable to Renewed Motions for Class Certification*, 30 A.B.A. ANTITRUST 89, 92 (Summer 2016) (suggesting that Rule 23(f) and Rule 23(c)(1)(C) are strategic alternatives available to class action litigants).

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[7] Federal Rule of Civil Procedure 23 (c)(1)(C) provides: "An order that grants or denies class certification may be altered or amended before final judgment."

If anything, Rule 23(f) appellate review may increase the level of certainty for litigants. Once an appellate court speaks to class certification issues in a Rule 23(f) appeal, the district court can no longer reconsider those issues under Rule 23(c)(1)(C), or at least its authority to do so will be narrowed by the court of appeals' ruling, thus enhancing certainty for the parties and the district court. *See McLel'an*, *supra*, at 92 (explaining that a Rule 23(f) decision constrains the district court's ability to alter or amend certification under Rule 23(c)(1)(C)) (citing *Gene & Gene, L.L.C. v. BioPay, L.L.C.*, 624 F.3d 698, 703 (5th Cir. 2010)).

In sum, we hold that (1) Rule 23(f)'s deadline is not jurisdictional, (2) equitable exceptions therefore apply, such that (3) motions for reconsideration filed within fourteen days toll that deadline. We also hold that (4) equitable circumstances beyond a formal motion to reconsider filed within fourteen days can toll the Rule 23(f) deadline. As discussed above, equitable circumstances tolled the Rule 23(f) fourteen-day deadline so that Lambert's 23(f) petition was timely filed in this court.[8]

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[8] The parties also debate whether an order granting a motion for reconsideration provides a new fourteen-day window to file a Rule 23(f) petition, because such an order is "an order granting or denying class certification." This would be another issue of first impression for this court. Other circuits to consider the issue have held that petitioners receive an additional fourteen days to file a Rule 23(f) petition if a motion for reconsideration is granted and changes the status quo of class certification, regardless of when the motion is filed. *See Nucor Corp.*, 760 F.3d at 343; *Fleischman*, 639 F.3d at 31; *In re DC Water & Sewer Auth.*, 561 F.3d at 496;

IV.

As Lambert's petition was timely, we turn to the merits, and conclude that the district court abused its discretion in decertifying the class on the basis of Lambert's inability to prove restitution damages through the full refund model.

Lambert brought his consumer class action under Federal Rule of Civil Procedure 23(b)(3). "Under Rule 23(b)(3), the court must find that 'questions of law or fact common to class members predominate over any questions affecting only individual members.'" *Pulaski*, 802 F.3d at 985. A Rule 23(b)(3) plaintiff must show a class wide method for damages calculations as a part of the assessment of whether common questions predominate over individual questions. *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013). The party seeking to maintain class certification bears the burden of demonstrating that the Rule 23 requirements are satisfied, even on a motion to decertify. *Mario v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011); *United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010).

We have repeatedly emphasized that uncertain damages calculations should not defeat certification. In *Yokoyama*, we held that "damage calculations alone

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Gutierrez, 523 F.3d at 194; *Jenkins*, 491 F.3d at 1291-92; *Carpenter*, 456 F.3d at 1191-92; *McNamara*, 410 F.3d at 281. We need not decide this question, as we hold that Lambert's petition was timely under a tolling theory, and, in any case, the district court denied Lambert's motion.

cannot defeat certification." 594 F.3d at 1094. After our decision in *Yokoyama*, the Supreme Court held in *Comcast* that a Rule 23(b)(3) plaintiff must show that "damages are capable of measurement on a classwide basis." *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013). We have since reconciled our holding that uncertain damages cannot destroy class certification with *Comcast's* holding that plaintiffs must show that their damages are capable of classwide measurement. In *Leyva*, we reaffirmed that uncertain damages calculations alone cannot defeat class certification because *Comcast* stood only for the proposition that "plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability." *Leyva*, 716 F.3d at 513-14.

Uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages. *Id.* at 514; *see also Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (explaining that the law "requires only that damages be capable of measurement based upon reliable factors without undue speculation"). "[T]he fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery." *Pulaski*, 802 F.3d at 989 (quoting *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932, 939 (9th Cir.1999)); *see also Just Film, Inc. v. Buono*, 847 F.3d 1108, 1121 (9th Cir. 2017) (reaffirming that so long as the proposed damages model is attributable to the plaintiff's legal theory of the harm,

and damages can be determined without excessive difficulty, decertification is not warranted).

Class wide damages calculations under the UCL, FAL, and CLRA are particularly forgiving. California law "requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." *Pulaski*, 802 F.3d at 989 (quoting *Marsu*, 185 F.3d at 938-39) (referring to the UCL and FAL); *see also Wiener v. Dannon Co.*, 255 F.R.D. 658, 670 (C.D. Cal. 2009) (providing that courts also have "'very broad' discretion to determine" damages under the CLRA); *Colgan v. Leatherman Tool G.T., Inc.*, 38 Cal. Rptr. 3d 36, 61 (Cal. Ct. App. 2006) (explaining that damages under the UCL and FAL "must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence"). Under California law, because restitution "damages may be computed even if the result reached is an approximation," *GHK Assocs. v. Mayer GT., Inc.*, 274 Cal. Rptr. 168, 179 (Cal. Ct. App. 1990), uncertain damages should not prevent class certification, B.W.I. Custom *Kitchen v. Owens-Illinois, Inc.*, 235 Cal.Rptr. 228, 237 (Cal. Ct. App. 1987) ("[W]e know of no case where [factual determinations of damages] ha[ve] prevented a court from aiding the class to obtain its just restitution.").

Lambert proposed measuring class wide damages under the full refund model. The full refund model measures damages by presuming a full refund for each

customer, on the basis that the product has no or only a de minimis value. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) ("Customers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back."). Here, Lambert presented evidence that the product at issue was valueless and therefore amenable to full refund treatment. We agree with the district court that the full refund model is consistent with Lambert's theory of liability. Accordingly, Lambert was required only to show that the full price amount of retail sales of the product could be approximated over the relevant time period, even if that figure or the data supporting it – in this case the average retail price multiplied by the number of units sold – was uncertain.[9] *Leyva*, 716 F.3d at 514.

Although Lambert did not present evidence of the actual average retail price, he did present evidence of both unit sales and the suggested retail price over the relevant time period.[10] There may well be additional evidence that Lambert could present at trial to support

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[9] This is not to say that every case proceeding under a full refund theory must produce figures for the average price and unit sales of a product. As Lambert argued in his motion for class certification, point-of-sale data approximating the total retail expenditure would also be an appropriate method of calculating restitution on a worthless item. So, too, would evidence of the defendant's wholesale revenue, if reasonably capable of being weighed or adjusted by the trier of fact to account for possible difference between wholesale and retail values.

[10] Notably, the suggested retail price was cited as one of the original grounds for certifying the class.

an average retail price. For example, the record contains evidence that Lambert paid $16-$18 per 30-count bottle of the product and that Nutraceutical, through its website, sold 30-count bottles for $14.39 during this time frame. The suggested retail price in conjunction with Lambert's other evidence suggests that a trier of fact could calculate or sufficiently approximate the average retail price for the product.

We recognize that a suggested retail price does not "automatically configure an average," but such a precise average is unnecessary for class certification. At this stage, the question is only whether Lambert has presented a workable method. We conclude that he has.

Accordingly, because Lambert's damages model matched his theory of liability, and because Lambert had shown that his damages model was supportable on evidence that could be introduced at trial, the class should not have been decertified. The district court abused its discretion in holding otherwise, contrary to our law. *See Hinkson*, 585 F.3d at 1261-62 (holding that legal error is an abuse of discretion); *see also Pulaski*, 802 F.3d at 989; *Leyva*, 716 F.3d at 513-14; *Yokoyama*, 594 F.3d at 1094. Whether Lambert could prove damages to a reasonable certainty on the basis of his full refund model is a question of fact that should be decided at trial.[11]

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[11] Because we hold that Lambert showed damages sufficient to avoid decertification under the full refund model, we need not reach the question of whether he waived his non-restitutionary disgorgement argument, or whether that arguments fails on the merits.

V.

For the foregoing reasons, we conclude that Lambert's Rule 23(f) petition was timely, reverse the district court's order decertifying the class, and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TROY LAMBERT, Plaintiff, NUTRACEUTICAL CORPORATION, Defendant.	Case No. ED CV 13-05942-AB (SPx) **ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION** (Filed Jun. 24, 2015)

Pending before the Court is Plaintiff Troy Lambert's Motion for Reconsideration, (Motion, Dkt. No. 183), of the Court's order, (Order, Dkt. No. 175), granting Defendant Nutraceutical Corporation's Motion for Class Decertification. Defendant filed an Opposition and Plaintiff filed a Reply. (Dkt. Nos. 189, 192.) The Court took this matter under submission on April 23, 2015. (Dkt. No. 194.) For the reasons discussed more fully below, Plaintiff fails to satisfy the requirements for reconsideration, and the Court **DENIES** the Motion.

I. BACKGROUND

The full factual and procedural history of this litigation is familiar to the Parties. The case centers on a

product called Cobra Sexual Energy ("Cobra"), a dietary supplement. Defendant manufactures and markets Cobra. Plaintiff brought a consumer class action suit against Defendants for Violation of the Unfair Competition Law ("UCL"), Unlawful Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the UCL, Unfair and Fraudulent Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the False Advertising Law ("FAL") (Cal. Bus. & Prof. Code § 17500 *et seq.*); Violation of the Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 *et seq.*). (*See* Second Amended Complaint "SAC," Dkt. No. 56.)

In June 2014, the Honorable Audrey B. Collins granted Plaintiff's Motion for Class Certification under Federal Rule of Civil Procedure ("Rule") 23(b)(3). (*See generally* Dkt. No. 80.) The class was certified under Plaintiff's FAL, UCL, and CLRA theories and the theories were to be measured using the full refund damages model theory. (*Id.*) Judge Collins anticipated calculating damages using Defendant's sales data and an average retail price. (*Id.* at pp. 12-13.)

After the completion of discovery, Defendant moved for class decertification based on, *inter alia*, Plaintiff's inability to demonstrate a classwide calculation of damages using his evidence. (*See* Dkt. Nos. 111, 122.) The Court agreed with Defendant and granted its Motion. (*See* Order.) The Order only addressed the inadequacy of Plaintiff's damages model, which was dispositive of the entire question in decertifying class. (*See* Order.) After the Court entered judgment, Plaintiff moved for reconsideration.

II. LEGAL STANDARD

Generally, a motion for reconsideration brought within 28 days of the entry of judgment is treated as a motion under Rule 59(e). *See* Fed. R. Civ. Proc. 59(e) (motions to alter or amend judgment under that rule must be brought within 28 days of entry of judgment); *see also In re Benham*, No. CV 13-00205-VBF, 2013 WL 3872185, at *1 (C.D. Cal. May 29, 2013) ("A motion for reconsideration filed within 28 days of a judgment is typically treated as a motion under Federal Rule of Civil Procedure 59(e)."). "Under Rule 59(e), a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). "For reasons of judicial economy and finality, such motions are disfavored and are rarely granted." *Resolution Trust Corp. v. Aetna Cas. & Sur. Co.*, 873 F. Supp. 1386, 1393 (D. Ariz. 1994)

Reconsideration "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (quotation omitted). A motion to reconsider may not "rehash[ ] what ha[s] been before the court when it ruled" on the prior motion. *Faysound Ltd. v. United*

Coconut Chemicals, Inc., 878 F.2d 290, 296 (9th Cir. 1989); *accord Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996) ("Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion."). Nor does reconsideration afford a party an opportunity to try out new arguments or evidence that it could have, but did not, discover or advance the first time around. *U.S. v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1130 (E.D. Cal. 2001); *United States v. Navarro*, 972 F.Supp. 1296, 1299 (E.D. Cal. 1997). Generally, the aim of reconsideration is to accommodate a fundamental change in circumstances going to the heart of a court's original analysis.

Alternatively, reconsideration may also be used as a narrow vehicle to correct a "clear" or "manifest" error of law or fact in a court's earlier ruling. *Roschewski v. Raytheon Co.*, 471 F. App'x 588, 589 (9th Cir. 2012) (citing *School Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, *supra*, 5 F.3d 1255, 1262-63 (9th Cir.1993). Although the Ninth Circuit has not yet articulated what constitutes a "clear" or "manifest" error for the purposes of reconsideration, other circuits have. As the Fifth Circuit has noted, "'clearly erroneous' is a very exacting standard. Mere doubts or disagreement about the wisdom of a prior decision . . . will not suffice for this exception. To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must be dead wrong." *Hopwood v. State of*

Texas, 236 F.3d 256 (5th Cir. 2000) (internal quotes omitted); *see also Campion v. Old Republic Home Prot. Co.*, No. 09-CV-748-JMA NLS, 2011 WL 1935967, at *1 (S.D. Cal. May 20, 2011) (citing *Hopwood* and applying this standard on motion for reconsideration). Similarly, a "'manifest error' is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000); *see also Mays v. Colvin*, No. 1:13-CV-00904-SKO, 2014 WL 6893825, at *3 (E.D. Cal. Dec. 8, 2014) (citing *Oto* and applying this standard on motion for reconsideration).[1]

III. DISCUSSION

Plaintiff seeks reconsideration on the ground that the Court committed clear and manifest error in not considering Plaintiff's alternative disgorgement model. (*See* Mot.) According to Plaintiff, he properly proposed an alternative damages model to measure

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[1] In moving for reconsideration, Plaintiff seeks to treat this as a renewed motion for class certification under Rule 23. (Mot., p. 5 ("[R]ule that class certification orders are inherently tentative should govern over the general rule for motion for reconsideration.").) At the March 2, 2015 Status Conference, the Court already denied Plaintiff's request to file a renewed motion for class certification. (Dkt. No. 177, 5:6-20 ("[F]eel free to file your motion for reconsideration . . . [Defendant] will be looking very carefully to make sure that it is not a new motion [for class certification]. . . .").) Consequently, this Motion is discussed under the reconsideration standard and the Court does not conflate this standard with any other the legal standards.

restitution and the Court erred in not accepting this alternative.[2]

A. The Court Did Not Err in Rejecting Plaintiff's Full Refund Model and Did Not Ignore Plaintiff's *Newly* Proposed Disgorgement Model

Plaintiff argues that the Court failed to consider his alternative disgorgement model. (Mot., pp. 7-8, 10-11.) Plaintiff contends that this alternative damages model was proposed during the December 22, 2014 oral argument and was also presented in his Summary Judgment briefing. (Mot., p. 11 ("The Court.. erred in disregarding this model . . . which Plaintiff's counsel expressly brought to the Court's attention during oral argument[ ]. . . ."); Gregory Weston Declaration, Dkt. No. 187, ¶ 2.)

The Court stresses that a request to reconsider is not an opportunity to raise arguments or present evidence for the *first time* when one could have reasonably raised these contentions earlier in the litigation. *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 887, 890 (9th Cir. 2000) (citing *389 Orange St.*, 179 F.3d at 665)

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[2] The Parties again focus their arguments on irrelevant issues – the materiality prong of Plaintiff's state law claims and the typicality prong under Rule 23. (Dkt. No. 80; *cf.* Mot., pp. 17-18; Opp., pp. 16-21, Reply, pp. 14-18.) The Court previously disregarded these identical arguments in its Order, and Plaintiff does not assert clear error in not addressing those arguments therein. (Order, p. 4 n. 1.). Consequently, the Court will not address these contentions within this discussion.

(emphasis added). Neither should the Court have to search other pleadings in the litigation to ascertain a party's arguments. *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("Judges are not like pigs, hunting for truffles buried in briefs" or oral arguments." (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991))).

As the Parties recall, Defendant moved to decertify class on various grounds, namely that Plaintiff's damages model was insufficient, and Plaintiff opposed the motion contending that his full refund damages model was sufficient using only Defendant's sales data. (Dkt. Nos. 111, 141.) The Court granted Defendant's Motion to decertify class because restitutionary damages could not be calculated using only Defendant's sales data. (Order, pp. 7-11.) Now, Plaintiff no longer rests his measurement of classwide damages on the full refund damages model – a model *he suggested* in certifying the class. (Dkt. No. 65, p. 22 ("Finally, not only is a full refund [model] of the purchase price . . . consistent with all of Plaintiffs' theories of liability. . . ."); *cf.* Dkt. No. 141, p. 10 ("As further explained below, Plaintiff's full refund damage model is consistent with his liability theory that Cobra is ineffective and illegal.").) The Court's Order did not address Plaintiff's alternative disgorgement model for the simple reason that Plaintiff did not propose this alternative disgorgement model anywhere in his opposition to decertify class or during oral argument. (*See generally* Dkt. No. 141; *see also* Dkt. No. 147 (the "Hearing").)

In reviewing Plaintiff's opposition to the motion to decertify class, it is abundantly clear that Plaintiff's newfound disgorgement model and arguments in support of that model were well outside the record before the Court. To the extent Plaintiff thought proposing this alternative model was material to opposing Defendant's motion for class decertification, he was free to make that contention in his opposition. He failed to do so. Only *now* does Plaintiff extensively cites to his papers in support of Summary Judgment. (Mot., pp. 10-11 (citing Dkt. No. 161 [Pl. Reply to Pl. Summ. J. Mot.] at 24-25; Dkt. No. 129 [Pl. Summ. J. Mot.] at 23-24).) First, these citations to his summary judgment motion and the reply brief are not mentioned anywhere in his opposition to decertify class. (*See generally* Dkt. No. 141.) Second, Plaintiff's assertion of clear error because the Court should have considered arguments *outside* of the four corners of his opposition to class decertification lacks legal support.[3] It is unreasonable for Plaintiff to expect the Court to extrapolate this alternative damages model from his Summary Judgment briefing. In effect, Plaintiff seeks to transform the Court into "the lawyer for [Plaintiff],

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[3] Plaintiff has every right to cite to evidence attached to a separate motion for summary judgment. *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1135-36 (9th Cir. 2001) (noting on cross-motions for summary judgment, district court is required to review evidence filed in support of another motion so long as that evidence is "specifically identified in [the] moving papers."). But a party (Plaintiff) opposing a motion who wishes to have the court consider evidence cited in a separate motion for summary judgment must actually *cite* the evidence *in its opposition papers*. *Id.*

performing the lawyer's duty of setting forth specific [arguments]. . . ." *Carmen v. San Francisco Unified School Dist*, 237 F.3d 1026, 1031 (9th Cir. 2001) (considering whether a judge must consider materials outside the motion papers). It would have been "unfair" to the Court and "profoundly unfair" to Defendant to require the Court "to search the entire record for [arguments], even though [Plaintiff] [did] not set [them] out in the opposition papers." *Id.*; *in accord In re E.R. Fegert, Inc.*, 887 F.2d 995, 957 (9th Cir. 1989) (the "argument must be raised sufficiently for the trial court to rule on it.") (citation omitted); *Independent Towers*, 350 F.3d at 929 ("Our adversarial system relies on the advocates to inform the discussion and raise the issues to the Court.").

Plaintiff's next argument is that the Court "disregarded" this alternative damages model despite "Plaintiff's counsel expressly [bringing] [the alternative damages model] to the Court's attention during oral arguments." (Mot., p. 11 ¶ 2.) The Court's review of the hearing transcript reveals not one reference to the word "disgorgement" or "alternative." (*See* Hearing.) Plaintiff's counsel apparently suggests he had somehow proposed an alternative damages model when he cited the summary judgment briefing during oral argument.[4] (Weston Decl., ¶ 2.) Even if it had been

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[4] In highlighting a portion of the Hearing, Plaintiff's counsel declares that he "referred the Court to Plaintiff's Motion for Summary Judgment and Reply in Support of Motion for Summary Judgment." (Weston Decl., ¶ 2.) Though it is true that Plaintiff did reference such briefs during oral argument, (Hearing,

proper to propose an alternative damages model at oral argument, the record reflects that Plaintiff did no such thing. Instead Plaintiff made a fleeting reference to his summary judgment papers without any reference to an alternative damages model. (*See generally* Hearing.) The Court's duty during oral argument is not to deduce arguments from implicit statements. *Independent Towers*, 350 F.3d at 929 ("The art of [oral] advocacy is not one of mystery."). To argue otherwise would be unreasonable.

Simply put, this is the *first time* Plaintiff has brought this alternative damages model to the Court's attention, and there is neither a single sentence in his opposition nor any reference made during oral argument regarding an alternative damages model. (*See* Dkt. Nos. 129, 141; *see also* Hearing.) In hindsight, Plaintiff may wish he had proposed an alternative damages model much earlier. *See, e.g.*, *Brown v. Hain Celestial Group, Inc.*, No. C 07-01882 JF (RS), 2010 WL 760433, at *1142 (N.D. Cal. 2010) (Proposing multiple damages models (dominant-firm and regression models) in a motion to certify class). But reconsideration is not an opportunity to take a second bite at the apple. *Campion v. Old Repub. Home Protection Co., Inc.*, No. 09- CV-00748-JMA(NLS), 2011 WL 1935967, at *1 (S.D. Cal. May 2011). It is an opportunity to correct the Court's error, not Plaintiff's. *FDIC v. Jackson – Shaw Partners, No. 46, Ltd.*, 850 F.Supp. 839, 845 (N.D. Cal. 1994) (motions for reconsideration "are not to be used

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7:20-23, 8:1-4, 17:11-25), the statements had nothing to do with any purported alternative damages model.

to test new legal theories that could have been presented when the original motion was pending.").

Accordingly, the Court finds that Plaintiff's failure to explicitly raise this newly proposed alternative damages model arguments in his opposition papers or oral argument amount to a waiver of this argument. *Moreno Roofing*, 99 F.3d at 343 (passing remarks on an issue in opposition to summary judgment were insufficient to avoid waiver); *U.S. v. George*, 291 Fed. App'x. 803, 805 (9th Cir. 2008) (holding party's "failure to adequately develop these arguments in his brief operates as a waiver"); *accord John-Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011) (the party "failed to develop any argument on this front, and thus has waived it"); *JustMed, Inc. v. Byce*, 580 Fed.Appx. 566, 567 (9th Cir. 2014) ("Because [Defendant] did not properly raise this argument before the district court . . . the argument is waived."); *US. v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997) (where party fails to "coherently develop[ ]" an argument on appeal "we deem it to have been abandoned").

But even if Plaintiff had not waived this argument and proposed this alternative disgorgement model within his opposition to class decertification, his alternative damages model still does not undermine the Court's reasoning.

B. The Undisputed Evidence Shows that Plaintiff Still Cannot Present a Viable Damages Model Under His *New* Disgorgement Model

The remainder of Plaintiff's Motion for Reconsideration concerns his alternative disgorgement model. (Mot., pp. 6-17.) Under this disgorgement model, Plaintiff contends that there was sufficient evidence to measure classwide restitutionary damages. (Mot., pp. 11-14.) Plaintiff's contention that the Court's ruling erred rests on several pieces of evidence.

1. Restitution and the Disgorgement Remedy

As a preliminary matter, it is necessary for the Court to address the appropriate standard of law in measuring restitution.

Under Plaintiff's theories of recovery, "[t]he False Advertising Law, the Unfair Competition Law, and the CLRA authorize a trial court to grant restitution to private litigants. . . ." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 694, 38 Cal. Rptr. 3d 36 (Cal. App. 2006) (citations omitted). Restitution is the only form of monetary relief under the UCL. *BizCloud, Inc. v. Computer Sciences Corporation*, Case No. C-14,00162 JCS, C-13-05999 JCS, 2014 WL 1724762, at *3 (N.D. Cal. 2014) (citations omitted). "The object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." *Korea Supply Co. v. Lockheed Martin Corp.*,

29 Cal. 4th 1134, 1148, 131 Cal. Rptr. 2d 29 (Cal. 2003) (UCL case); *see also In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 130, 103 Cal. Rptr. 3d 83 (Cal. App. 2010) (restitution available under FAL). "The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution." *Vioxx*, 180 Cal. App. 4th at 131, 103 Cal. Rptr. 3d 83.

In measuring restitution, some courts have utilized the remedy of disgorgement. There are two forms of disgorgement – restitutionary and non-restitutionary – the latter of which is not available under California law. *Korea Supply Company*, 131 Cal. Rptr. 2d 29, 40 (California Supreme Court stating that "[w]hile express authority to order restitution was added to the UCL, courts were not given similar authorization to order nonrestitutionary disgorgement."). Restitutionary disgorgement is limited to (1) money or property once in the plaintiff's possession and (2) money in which the plaintiff has a vested interest. *Korea Supply Company*, 131 Cal. Rptr. 2d 29, 41-42 ("Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest.").

The distinction between restitutionary and non-restitutionary disgorgement turns on whether the money the plaintiff seeks is money that was originally obtained by the defendant from the plaintiff. *See, e.g.*, *Kraus v. Trinity Mgmt. Servs. Inc.*, 23 Cal. 4th 116, 126-27, 96 Cal. Rptr. 2d 485 (Cal. 2000) *superseded on other grounds, as recognized in Arias v. Superior Court*, 46

Cal. 4th 969, 95 Cal. Rptr. 3d 588 (Cal. 2009). If that is the case, the disgorgement is restitutionary in nature. *Id.* To the extent the plaintiff seeks to disgorge monies that were not taken from the plaintiff, such monetarily relief is nonrestitutionary and unavailable under the UCL. *Korea Supply Company*, 131 Cal. Rptr. 2d 29, 36-46.

2. Using Plaintiff's Methodology In Calculating the Average Retail Price Produces a Nonrestitutionary Disgorgement Model Which Is Impermissible Under California Law

Here, Plaintiff disputes the Court's underlying conclusion that failing to present an average retail price was fatal to his full refund damages model. (Mot., pp. 6-7.) Now, Plaintiff presents evidence to calculate an average retail price. (*Id.*) According to Plaintiff, a jury could determine the average retail price of Cobra using his suggested retail prices. (*Id.*) The suggested retail prices derive from (1) Defendant's product guides that are distributed to its retailers, (2) Plaintiff's deposition, and (3) Defendant's website where it sells Cobra directly to consumers. (*Id.*) Plaintiff claims that a quantifiable sum can be calculated using any of these retail prices. (*Id.* at pp. 14-15 (citing to Pl. Summ. J. Briefing).) Although the retail prices have fluctuated over time, Plaintiff contends that the prices have continued to stay consistent with one another. (*Id.* at p. 6 ¶¶ 4-5, Weston Decl. Exs. 1-4 (since 2009, the suggested retail prices from Defendant's product guides

vary from $13.79 for a 30 count bottle, between $23.79 to $24.29 for a 60 count bottle, and between $35.39 to $ 36.19 for a 120 count bottle).)[6] According to Plaintiff, the prices need not be exact and are in fact adequate for a jury to ascertain an average retail price. (*Id.* at p. 7 ¶ 1.) Although a quantifiable sum can be calculated using these prices and restitution need not be precisely measured at this stage, the *newly* presented evidence is unreliable and renders the alternative disgorgement model nonrestitutionary in nature.

First, in examining the suggested retail prices in Defendant's product guides, (Weston Decl., Exs. 1-4.), the Court finds such evidence to be unreliable in determining the average retail price. As the Court discussed in its prior ruling, the prices wholesalers suggest to its retailers are not the prices at which retailers sell the product. (*See* Order, p. 10 (citing *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 32 80 S.Ct. 503, 506 4 L.Ed.2d 505 (1960) ("[D]rug retailers in the two cities advertised

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[6] Again, this evidence Plaintiff relies on for this proposition is nowhere to be found in any of his opposition to decertify class. (*See generally*, Dkt. No. 141.) Plaintiff does not claim that this evidence is newly discovered. Therefore, such evidence should have been presented to the Court in those previous opposition papers, not a motion for reconsideration. Local Rule 7-9 (The opposing party shall file "the evidence upon which the opposing party will rely in opposition to the motion and a brief but complete memorandum which shall contain a statement of all the reasons in opposition thereto and the points and authorities upon which the opposing party will rely. . . ."); *cf.* Local Rule 7-18 ("A motion for reconsideration of the decision on any motion may be made only on the grounds . . . (c) a manifest showing of a failure to consider material facts presented to the Court *before* such decision.").

and sold several [ ] vitamin products at prices substantially below the suggested minimum retail prices.").) In his Reply, Plaintiff appears to challenge the assertion that retailers set their own pricing for the products they receive from wholesalers. (Reply, pp. 5-6.) Because there is no evidence of an example where a vendor marked Cobra's suggested retail price up or down, Plaintiff seeks to move forward under the assumption that vendors accept the price suggestions within the product guides and do not make any price adjustments whatsoever. (*Id.*) Plaintiff's logic is flawed. Retailers have the ability to set their own prices (mark-up or mark-down) for the products they buy from the wholesalers because that is how retailers make a profit. *F.T.C. v. Figgie Intern., Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) ("[Defendant] sells heat detectors for cash to distributors, who apparently have complete discretion to set their own mark-ups."). The same can be said about Defendant and the vendors who sell Cobra. (*See* Dkt. No. 111, Ex. H., 144:17-21, Jeffery A. Hinrich's Transcript ("The retailer sets their own pricing. [Defendant has] a price that [Defendant sells] to the retailer [at]. [Defendant does] not know what [the retailer] will do with that price . . . what [the retailer] will put as a markup once [the retailer receives] the product.").); *in accord Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PHI, 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014) (denying class certification because, *inter alia*, plaintiff provided no evidence to account for the "prices in the retail market [that] are affected by the nature and location of the outlet in which [the product] [is] sold.") (citation omitted). Plaintiff's use of these

suggested retail prices fails to take into account the retailer's discretion which is why the Court expects Plaintiff to collect data and present an average retail price.

Second, using Plaintiff's deposition as a basis to calculate an average retail price is not only unreliable but illogical. Defendant contends that Plaintiff's deposition is unreliable because of the inconsistency in Plaintiff's statements. In his complaint, Plaintiff states that he bought Cobra at a local Rite-Aid for about "$16$17" which is inconsistent with Plaintiff's deposition where he recalls buying Cobra for about "$16-$18." (Dkt. No. 189 ("P1. Depo."), 40:25; *cf.* Dkt. No. 56 (Second Amended Complaint), ¶ 18.) Plaintiff's inconsistencies are evident, but the Court is more concerned with the illogical request Plaintiff asks of the jury. For Plaintiff to ask a juror to determine the average retail price based on one particular value a vendor (Rite-Aid) used in selling Cobra makes no sense. As mentioned earlier, retailers have discretion in setting prices for their products which is why a product's price varies from vendor to vendor. Plaintiff's recollection of *one* price at Rite-Aid in 2012 represents only *one* piece of the puzzle in formulating an *average* retail price. The Court expects an *average* retail price, not *one* retail price.[6]

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[6] To the extent Plaintiff simply seeks to use Plaintiff's deposition as evidence of the consistency in value between these three sets of prices, the Court still is not persuaded. There is a clear inconsistency between Plaintiff's testimony and his complaint. (Pl. Depo. 40:25; *cf.* Second Amended Complaint, ¶ 18.) Plaintiff

Third, using Defendant's website where it sells Cobra directly to consumers is, as Defendant argues, rife with problems. (Opp., pp. 5-7.) This is the price Defendant (not the retailers) utilizes in selling Cobra to consumers. Defendant has already stated that it rarely sells Cobra through its website. (Hinrichs Decl., Dkt. No. 189-5, ¶ 3 (stating that since 2009, 44 bottles of Cobra have been sold through Defendant's website).) More importantly, Plaintiff does not seek to disgorge profits from Defendant's direct sales to consumers. If Plaintiff sought to disgorge those profits, then an average retail price would be unnecessary because Defendant's direct sales to consumers are profits that Plaintiff and class members have an ownership interest in. But, Plaintiff does not seek to disgorge profits from Defendant's direct sales to consumers. Instead, Plaintiff seeks to disgorge profits from Defendant's sales to the retailers. This is inappropriate under California law because Plaintiff and the class members do not have an ownership interest in Defendant's sales to third party vendors.[7] *Madrid v. Perot Systems Corp.*, 130 Cal. App. 4th

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has not produced a receipt or any other concrete documentation to support his statements, (Pl. Depo., 41:6-7.), yet he seeks to use this price he remembers (from purchasing Cobra in 2012) as evidence within his damages model. Because of the inconsistences and lack of evidentiary proof regarding this price, the Court does not consider such evidence as being consistent with the other suggested retail prices.

[7] The Court agrees with Plaintiff on one point. (Reply, p. 8 ¶ 2.) Defendant does not walk away free from liability because it never sold Cobra directly to consumers. Nor is Plaintiff required to sue all of the retailers who sold Cobra directly to consumers. What the Court is saying is that Plaintiff needs both pieces of evidence under this model – Defendant's sales to its retailers and

440, 455-462, 30 Cal. Rptr. 3d 210 (Cal. App. 2005) ("Plaintiff's generalization fails to acknowledge the specific limitation applicable in the UCL context – that restitution means the return of money to those persons from whom it was taken or who had an ownership interest in it.") (citation omitted). Rather, the class members have an ownership interest in the retail sales, *i.e.*, amounts they paid directly to the retailer. (*See* Order, p. 8.) This is why an average retail price is so essential because it is the sole variable to which Plaintiff and the class members have an ownership interest in. Defendant's website prices do not reflect the ownership interest class members have in Cobra's retail profits and to allow Plaintiff to use this data as a means to calculate an average retail price would be improper. *Lee Myles Assoc. Corp. v. Paul Rubke Enter., Inc.*, 557 F.Supp.2d 1134, 1144 (S.D. Cal. 2008) ("Disgorgement of profits earned by defendants as a result of allegedly unfair practices, where the money sought to be disgorged was not taken from the plaintiff and the

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the average retail price used in selling Cobra – to bridge the gap between Defendant's gains and Plaintiff's ownership interest within those gains. *Johns v. Bayer Corp.*, Civil No. 09-CV-1935-AJB (DHB), 2012 WL 1520030, at *4 (S.D. Cal. 2012) ("because [Defendant's] profits for its Men's Vitamins would seemingly have originated from the class members' purchases of the products, Plaintiffs contention that they are seeking restitutionary disgorgement of Bayer's profits is arguably accurate." But "it is for the District Judge to determine which measure of restitution is appropriate in this case . . . " and Plaintiffs' duty is to obtain "the evidence which supports a theory of restitutionary disgorgement. . . .").

plaintiff did not have an ownership interest in the money, is not authorized.").

Ultimately, Plaintiff's alternative disgorgement model and the accompanying retail price suggestions do not address the previously highlighted impasse – the inability to calculate restitution.[8] (Order, p. 11.) For the reasons stated above, the Court concludes that Plaintiff's *new* evidence is insufficient. And since the discovery deadline has lapsed, Plaintiff must again

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[8] Even assuming *arguendo* that such retail prices are appropriate in measuring restitution, Plaintiff leaps to the conclusion that a jury could somehow determine an average retail price using these set of numbers. (Mot., pp. 6-7; *cf.* Opp., p. 9.) In his Reply, Plaintiff states that the jury would weigh the evidence (the suggested retail prices) and then determine for itself what it believes the actual retail price is. (Reply, pp. 6-7 n.1.) Plaintiff continues to claim that the calculations will not be difficult, simply multiply the average retail price by the number of bottles sold using Defendant's sales data. (*Id.*) But Plaintiff ignores the question of how picking one suggested retail price (one price for each bottle count) automatically configures an *average*.

Judge Collins and this Court expected Plaintiff to produce an *average* retail price under this damages model, but Plaintiff's evidence does not reflect a set of retail values of Cobra that typify a set of various vendors. For example, the prices within Defendant's product guides are in fact *suggestions* made to retailers. No evidence demonstrates that these suggested prices match the prices various retailers set for Cobra. The Court recognizes that calculating damages need not be exact or "mathematically precise" at this stage, but the Court will not ignore Plaintiffs speculative approach in relying on price suggestions within a product guide as a basis to determine an average retail price. *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (the law "requires only that damages be capable of measurement based upon reliable factors without *undue speculation*.") (emphasis added).

solely rely on Defendant's sales data, which the Court has already considered and found insufficient in calculating restitution. (*See* Order (citing *Caldera v. J.M. Smucker Co.*, CV 12-4936-GHK VBKX, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) ("[C]lasswide damages cannot accurately be measured based on Defendant's sales data alone.").) Using the sales data alone, Plaintiff seeks to disgorge Defendant of what Defendant received from its wholesale sales, but as previously mentioned, Plaintiff and his class members do not have an ownership interest in those sales. To move forward with only one of these variables (Defendant's sales data) undermines the purpose of restitution and the requirement of having an ownership interest in the disgorged profits. *Shersher v. Superior Court*, 154 Cal. App. 4th 1491, 1499, 65 Cal. Rptr. 3d 634 (2007) (*Korea Supply* only requires "that the plaintiff must be a 'person in interest' (that is, the plaintiff must have had an ownership interest in the money or property sought to be recovered).") (citing *Korea Supply*, 131 Cal. Rptr. 2d at 41).

Plaintiff continues to argue that the Court is being too restrictive in applying restitution. (Mot., pp. 12-13.) The definition of restitution is clear-cut, and courts will only award class-wide restitution when it "serves to provide what the class members lost, not what the [d]fendant gained" unless the class members have an ownership interest in defendant's gains. (*See* Order, p. 8 (citing *Astiana*, 2014 WL 60097, at *12-13); *see also Korea Supply Company*, 131 Cal. Rptr. 2d 29, 35-46. Plaintiff is attempting to evade the requirements

under this definition. The problem with Plaintiff's evidence and his reoccurring arguments is that he seeks an award of monies that exceed his ownership interest. Moreover, Plaintiff's arguments that equitable principles favor his disgorgement model are equally unpersuasive. (Mot., pp. 15-16.) For Plaintiff to argue in favor of equitable principles on one hand but then request the Court to compromise on such equitable requirements on the other hand is inconsistent. In any case, such a contention is ineffective because Plaintiff's model fails to restore class members back to the status quo. *Korea Supply*, 131 Cal. Rptr. 2d at 41. Amidst his equitable policy considerations and other unpersuasive contentions, Plaintiff cannot avoid what is clear – his measurement of restitution does not meet the *Korea Supply* threshold. *Johns*, 2012 WL 1520030 at *4 ("[D]isgorgement is available to the extent it is restitutionary.") (citations omitted).

Plaintiff's continued attempt to manipulate his evidence to satisfy a restitutionary measurement is obvious. If Plaintiff's goal is to move forward with an adequate damages model, Plaintiff could have achieved that goal any time since June 2014 when Judge Collins certified this class action. (Dkt. No. 80.) From the moment the class was certified, Plaintiff was well aware of Judge Collins's expectation (an expectation of an average retail price). (*Id.*) As discovery proceeded, the responsibility of obtaining evidence to "readily calculate[] [classwide restitution] using Defendant's sales numbers and an average retail price" rested squarely on Plaintiff. (Dkt. No. 80, p. 13.) He choose not

to gather the data to formulate an average retail price and has since (until now) failed to propose an alternative damages model.

Accordingly, Plaintiff's arguments (new and old) have not changed the Court's stance, thus, the Court will not disturb its previous ruling.

C. Class Notice

Finally, Plaintiff argues that the Court's Order is defective because it did not address the issue of class notice upon decertifying class. (Mot., pp. 19-20.) Again, this is an argument that Plaintiff failed to set forth in his opposition to class decertification. That is sufficient grounds to disregard this contention under the reconsideration standards. *Independent Towers*, 350 F.3d at 929.

Irrespective of that standard, Plaintiff is correct that class members must receive notice following class decertification, but it is Plaintiff's duty to address and bear the cost of class notice, not the Court. *See Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002) (recognizing that the plaintiff bears the cost of class notice following decertification); *see also Radmanovich v. Combined Ins. Co. of America*, 271 F.Supp.2d 1075, 1078 (N.D. Ill. 2003) (plaintiff bringing forth a motion for class notice under Rule 23(e) following a denial of class certification) (citing *Culver*, 277 F.3d 908); *Barner v. City of Harvery*, No. 95 C 3316, 2004 WL 20920009, at *7 (N.D. Ill. 2004) (granting plaintiff's request for class notice following a class decertification) (citing

Culver, 277 F.3d 908). The Court's duty is to oversee the dissemination of class notice. Furthermore, Plaintiff argues that Defendant's decertification motion was defective for not providing a plan for class notice, but Plaintiff fails to recognize that this is *his* class action and he is responsible for bearing the costs of class notice when class is certified and decertified. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140 (1974) ("The usual rule is that a plaintiff must initially bear the cost of notice to the class."). Class notice is the responsibility of Class Counsel.

Accordingly, the Court disagrees with Plaintiff and does not reconsider its ruling based on his final argument.

IV. CONCLUSION

In light of the foregoing, the Court **DENIES** Plaintiff's Motion for Reconsideration. Plaintiff does not identify any new evidence or law that it could not have, with reasonable diligence, presented to the Court in his opposition papers. Nor does Plaintiff identify any material evidence or authorities cited in his opposition papers that the Court ignored or disregarded such that the Court can be said to have committed clear or manifest error.

Furthermore, the Court **ORDERS** Plaintiff to file a proposed notice with respect to class decertification no later than twenty-one (21) days following the issuance of this Order. Plaintiff will bear the cost of class notice. *Culver*, 277 F.3d at 915.

This case shall move forward with Summary Judgement and Trial. Because the Court previously vacated all dates, (Mt. No. 178), a status conference is scheduled for July 27, 2015 at 10:00 am to reset dates and discuss the possibility of supplemental Summary Judgment briefing considering this ruling.

IT IS SO ORDERED.

Dated: June 24, 2015

/s/ Andre Birotte Jr.
HONORABLE ANDRÉ
BIROTTE JR.
UNITED STATES
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TROY LAMBERT, Plaintiff, v. NUTRACEUTICAL CORPORATION, Defendant.	Case No. CV 13-05942-AB (Ex) **ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION** (Filed Feb. 20, 2015)

Pending before the Court is Defendant Nutraceutical Corporation's Motion for Class Decertification. (Mot., Dkt. Nos. 111, 122.) Plaintiff Troy Lambert filed an Opposition and Defendant filed a Reply. (Opp., Reply, Dkt. Nos. 141, 144.) A hearing was held on December 22, 2014. (Dkt. No. 147.) Having considered the materials submitted and the oral argument presented at the hearing, the Court hereby **GRANTS** the Motion.

I. BACKGROUND

This consumer class action involves a dietary supplement called Cobra Sexual Energy ("Cobra"). (*See* Second Amended Complaint "SAC," Dkt. No. 56.) Defendant manufactures and markets Cobra. (*Id.*) "Defendant's product Cobra primarily consists of a 'proprietary blend' of small amounts of extracts from herbs, roots, [] other organic substances . . . " and other plant-based materials. (*Id.* at ¶¶ 26-30.) From May 2011 through December 2011, on numerous occasions,

Plaintiff bought Cobra from different locations in California. (*Id. at* ¶ 15.) Plaintiff contends that Defendant "falsely market[s] [Cobra] as having beneficial health and aphrodisiac properties and being scientifically formulated to improve virility, despite that none of the ingredients in Cobra, individually or in combination, provide such benefits." (*Id.* at ¶ 1.)

On March 14, 2013, Plaintiff filed a class action complaint against Defendant alleging the following: Violation of the Unfair Competition Law ("UCL"), Unlawful Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the UCL, Unfair and Fraudulent Prong (Cal. Bus. & Prof. Code § 17200 *et seq.*); Violation of the False Advertising Law ("FAL") (Cal. Bus. & Prof. Code § 17500 *et seq.*); Violation of the Consumer Legal Remedies Act ("CLRA") (Cal. Civ. Code § 1750 *et seq.*). (*Id.*)

On June 19, 2014, this Court certified Plaintiff's class action. (Dkt. No. 80.) The class is defined as: **All persons (excluding officers, directors, and employees of [Defendant]) who purchased, on or after August 14, 2009, [Defendant's] Cobra Products (in all packaging sizes and iterations) in California for their own use rather than for resale or distribution.** (*See* Dkt. No. 83 (emphasis in original)).

Now that discovery is completed, Defendant moves for class decertification under Federal Rule of Civil Procedure ("Rule") 23. Plaintiff opposes decertification on several grounds.

II. LEGAL STANDARD

Rule 23 governs class certification in federal court. Fed. R. Civ. P. 23. Although it is not an express component of Rule 23, "courts have held that the class must be adequately defined and clearly ascertainable before a class action may proceed." *Zeisel v. Diamond Foods, Inc.*, C 10-01192 JSW, 2011 WL 2221113, at* 6 (N.D. Cal. June 7, 2011). A district court's decision to decertify a class is committed to its sound discretion. *See Knight v. Kenai Peninsula Borough School Dist.*, 131 F.3d 807, 816 (9th Cir. 1997). The standard used in reviewing a motion to decertify is the same as the standard used in evaluating a motion to certify. A district court "must conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996) (citing *In re American Medical Sys.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996)).

A court may choose to decertify a class on a party's motion or *sua sponte* at any time after the court conditionally certifies the class. Fed. R. Civ. P. 23(c)(1). Even on a motion to decertify, the party seeking to maintain class certification bears the burden of demonstrating that the Rule 23 requirements are satisfied. *Marlo v. U.P.S.*, 639 F.3d 942, 947 (9th Cir. 2011).

Based on discovery or other developments, a party may move to decertify the class on the basis that the prerequisites and grounds for certification do not exist. *See Pierce v. County of Orange*, 526 F.3d 1190, 1200 (9th Cir. 2008); *Owner-Operator Independent Drivers*

Ass'n, Inc. v. Landstar System, Inc., 622 F.3d 1307, 1326 (11th Cir. 2010) (concluding that decertification was appropriate where the court ultimately determined that damages cannot easily be calculated for all class members).

III. DISCUSSION

This Court certified this class action under Rule 23(b)(3). (Dkt. No. 80, p. 16 ¶ 1.) Rule 23(b) states that a court may certify a class if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members. . . ." Fed. R. Civ. P. 23(b)(3). "A court must decide 'whether there are so many questions common to all of the plaintiffs that having class action treatment would be far more efficient than having a number of separate trials.'" *Slaven v. BP America, Inc.*, 190 F.R.D. 649, 657 (C.D. Cal. 2000) (citation omitted).

Defendant moves to decertify the class on the ground that individual issues predominate over common issues. Most importantly, Defendant argues that Plaintiff's full refund model fails because it does not satisfy the *Comcast* common methodology test, and because Plaintiff failed to obtain the evidence necessary to calculate damages. (Mot., pp. 11-14 (citing *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1430, 185 L.Ed.2d 515 (2013)). Plaintiff opposes Defendant's Motion, arguing that Plaintiff's proposed damages methodology is consistent with his theories of liability. (*See* Opp., pp. 12-15.)

The Court finds that class decertification is warranted because although Plaintiff's full refund model is consistent with his theories of liability, Plaintiff has not presented enough evidence to demonstrate that classwide damages can be measured.[1]

1. Plaintiff's Theory for Measuring Damages is Consistent with Plaintiff's Theories of Liability

The class was certified under Plaintiff's FAL, UCL, and CLRA theories and the theories were to be measured using the full refund damages model theory, which would be "readily calculated using Defendant's sales numbers and an average retail price." (*See* SAC; Dkt. No. 80, p. 13.)

a. The Legal Standard for Classwide Damages

To maintain a class under Rule 23(b)(3), a plaintiff must demonstrate that damages are measurable on a classwide basis through use of a "common methodology." *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1430,

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[1] The Court finds that the issue pertaining to the full refund model is dispositive and therefore need not reach the remaining issues involving the reliance and materiality prongs of Plaintiff's state law claims. (*See* Mot., pp. 5-11; Opp., pp. 2-10.) Because the Court certified this class under Rule 23(b)(3), the Court will not reach the Parties' arguments addressing certification under Rule 23(b)(2). (*See* Mot., pp. 15-16; Opp., pp. 15-17.) The deadline to certify the class under Rule 23(b)(2) has passed pursuant to Local Rule 23-3.

185 L.Ed.2d 515 (2013); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) ("[a]t class certification, plaintiff must present a likely method for determining class damages. . . ."). In order to certify a class, plaintiff's damages model must be consistent with the theory of liability against a defendant. *Id.* at 1433-34. In *Comcast*, the Supreme Court conducted a "rigorous analysis" of the Rule 23(b)(3) predominance requirement and concluded that the plaintiff "failed to establish that damages could be measure[d] on a [classwide] basis" because the common methodology in measuring damages was in excess of the liability theories asserted. *Id.* at 1431-32.

b. Plaintiff's Claims Seek Classwide Damages Under the Full Refund Model

Plaintiff's claim under the FAL is defined to include any statements, pictures, or labels made in connection with the sale of goods or services that is likely to deceive the reasonable consumer. *See Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008). A UCL action defines unfair competition to "mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the FAL]." *See* Cal. Bus. & Prof. Code § 17200; *see also In re Tobacco II Cases*, 46 Cal. 4th 298, 312, 93 Cal. Rptr. 3d 559 (Cal. 2009). Under the CLRA, a defendant is liable if it misrepresents its goods to contain certain characteristics, uses, or benefits that the goods do not

have or advertises goods intending not to sell them as advertised. Cal. Civ. Code § 1770(a)(5), (7), (9) and (16).

Plaintiff seeks restitution under these claims. "The False Advertising Law, the Unfair Competition Law, and the CLRA authorize a trial court to grant restitution to private litigants asserting claims under those statutes." *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 694, 38 Cal. Rptr. 3d 36 (Cal. App. 2006) (citations omitted). "The proper measure of restitution in a mislabeling case is the amount necessary to compensate the purchaser for the difference between a product as labeled and the product as received." *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724-LHK, 2014 WL 7148923, at *8 (N.D. Cal. 2014) (citation omitted). Restitution is determined by "taking the difference between the market price actually paid by consumers and true market price that reflects the impact of the unlawful, unfair, or fraudulent business practices." *Werdebaugh*, 2014 WL 7148923, at *8.

Plaintiff uses the full refund model to measure restitution. The full refund model assumes the class members did not benefit from the product at issue, and therefore are entitled to a full refund. *In re POM Wonderful LLC*, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at *3 n.2 (C.D. Cal. Mar. 25, 2014) ("[T]he Full Refund model depends upon the assumption that not a single consumer received a single benefit. . . ."); *cf. In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (Cal. App. 2009) ("The difference between what the plaintiff paid and the value of what the plaintiff received is a

proper measure of restitution."). For a damages model such as this, "[c]alculations need not be exact." *Comcast*, 133 S.Ct. at 1433.

c. Plaintiff's Damages Model Matches His Theories of Liability

Defendant contends that this full refund model does not match Plaintiff's claims because it fails to account for the benefit that some class members got from Cobra. (Mot., p. 11 (citing *Caldera v. J.M. Smucker Co.*, CV 12-4936-GHK VBKX, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014)); *In re POM*, 2014 WL 1225184 at *3 n.2. Defendant argues that its experts and Leslie Garvin's declaration establish that at least some class members received a benefit from Cobra, which renders the full refund model inapplicable on a classwide basis. (*See, e.g.*, Leslie Garvin Declaration, Dr. Eli Seggev Report, Dr. Eric Gershwin Report, Dkt. Nos. 111-1, 111-5, 111-8.) As a result, Defendant asserts that Plaintiff's damages model exceeds his liability theories and is not a valid "common methodology," making individual issues predominate over common issues. *Comcast*, 133 S.Ct. at 1431. Plaintiff has presented evidence supportive of his principal theory that Cobra is valueless. (*See, e.g.*, Dr. George E. Belch Report, Dr. David L. Rowland Report, Opp., Exs. 1, 2, (stating, *inter alia*, that Cobra's ingredients are ineffective and unreliable for sexual enhancement purposes)).

The Court finds that Plaintiff's full refund damages model matches his theories of liability. Plaintiff

claims that Cobra is valueless, and Plaintiff has produced evidence that supports his claim. If the finder of fact finds that Cobra is in fact valueless then that justifies fully refunding the class for their purchases. *In re POM*, 2014 WL 1225184, at *3 n.2 ("[T]he Full Refund model depends upon the assumption that not a single consumer received a single benefit . . . from Defendant's [products].").

2. Class Decertification is Warranted Because Plaintiff Cannot Demonstrate a Classwide Calculation of Damages

The Court certified this class under Rule 23(b)(3) based on Plaintiff's representations regarding the full refund model. Based on these representations, the Court anticipated calculating damages using Defendant's sales data and an average retail price. (Dkt. No. 65, pp. 20-21 ("Thus, using the average suggested retail sales price for [Cobra], which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class.")). However, Plaintiff has not produced an average retail price or any other point-of-sale data to support his damages model. Instead, Plaintiff uses Defendant's sales data and unit sales as the only means of calculating damages. (Opp., p. 14; *cf.* Dkt. No. 65-2, Exs. 5-6.) Defendant argues that its sales data by itself cannot be used to calculate damages under Plaintiff's full refund model, and without the average retail price, no restitution can be calculated.

The average retail price is essential in this action. Normally, under the UCL full restitution standards, restitution is calculated by taking the average market price the consumer actually paid and deducting it from the true market price. *Werdebaugh*, 2014 WL 7148923, at *8 (citation omitted) Courts routinely require the use of an average retail price to calculate damages. *Chambers v. CVS Pharmacy, Inc.*, No. 09cv0419 JAH(RBB), 2009 WL 2579661, at *3 (S.D. Cal. 2009) (using the average retail price of $2.45 to determine that the plaintiff's causes of action could not exceed minimum amount in controversy required for diversity jurisdiction); *OS Enterprise, LLC v. Fairline Development Canada (1992) Ltd.*, No: C 11-4375 SBA, 2014 WL 1389540, at *3 (N.D. Cal. 2014) (accepting the magistrate's default judgment recommendation which calculated Plaintiff's lost profits using an average retail price of $13.00 per bird for the chicken brand).

In this context, the price Defendant sold Cobra to its wholesalers does not reflect the price class members actually paid. It is the average retail price that reflects the price class members actually paid. Obtaining the average retail price does not require Plaintiff to determine the individualized price each consumer spent. Instead, the average retail price is a standard amount each class member would be refunded based on the retail information gathered through discovery. Although the average retail price does not have to be exact, it is nevertheless critical at this stage of the litigation. Missing this calculation is a defect in Plaintiff's evidence that is fatal to his class claims because

restitution serves to provide what the class members lost, not what the Defendant gained. *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097 at *12-13 (N.D. Cal. Jan. 7, 2014) ("Restitutionary relief is an equitable remedy, and its purpose is 'to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.") (citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149, 131 Cal.Rptr.2d 29 (Cal. 2003)).

Plaintiff stated that he would use the average retail price to calculate damages and proposed no alternative method. (Dkt. No. 65, pp. 20-21.) However, during oral argument, it became clear that Plaintiff could only provide Defendant's own sales data and could not provide an average retail price. (Dkt. No. 147, 8:21-25; 9:7-10 ("Q: Help me understand how you're going to calculate the average retail price of this product." A: "Well, we have – what we had is we had the sales information for almost the entire class but not quite the whole class, and we took that . . . The UCL allows restitution of all funds received by way of unfair competition. And the defendants have told us what funds they received as a result of unfair competition.")).

Plaintiff already produced Defendant's sales data at the certification stage, which the Court relied upon in granting class certification based on Plaintiff's representations that he would supplement Defendant's sales data with the average retail price. (Dkt. No. 80, p. 13.) Now discovery is closed, and Plaintiff seeks to establish monetary relief on a classwide basis through

Defendant's sales data only. Yet, without the average retail price, classwide damages cannot be calculated. *Caldera*, 2014 WL 1477400 at *4 ("[C]lasswide damages cannot accurately be measured based on Defendant's sales data alone."); *Astiana*, 2014 WL 60097 at *12-13 (denying class certification because, *inter alia*, plaintiff provided no evidence regarding damages, and that "[e]stablishing a higher price for a comparable product would be difficult because prices in the retail market differ and are affected by the nature and location of the outlet in which they are sold").

Plaintiff claims that damages can be calculated based solely on Defendant's sales data but does not explain how to do so without the average retail price. (Opp., p. 14; *cf.* Dkt. No. 65-2, Exs. 5-7; Dkt. No. 147, 37:11-19.) The Court understands that the theory behind Plaintiff's claims is that consumers are not receiving any benefit because Cobra is illegal; therefore, restitution is warranted using a full refund model. However, Plaintiff has not provided the Court with a damages expert or any affirmative evidence as to how this restitutionary calculation will be achieved come trial. Absent any retail data that would identify the actual class injury, the Court could only speculate as to the extent of any classwide injury using only Defendant's sales data. For instance, retailers set their own pricing for Cobra, marking the prices up or down. (*See* Dkt. No. 111, Ex. H., 144:17-21, Jeffery A. Hinrich's Transcript ("The retailer sets their own pricing. [Defendant has] a price that [Defendant sells] to the retailer [at]. [Defendant does] not know what [the

retailer] will do with that price . . . what [the retailer] will put as a markup once [the retailer receives] the product."); *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 32 80 S.Ct. 503, 506 4 L.Ed.2d 505 (1960) ("[D]rug retailers in the two cities advertised and sold several [] vitamin products at prices substantially below the suggested minimum retail prices."); *see also F.T.C. v. Figgie Intern., Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) ("[Defendant] sells heat detectors for cash to distributors, who apparently have complete discretion to set their own mark-ups."). Because of the discrepancy in retail pricing, Defendant's sales data or what Defendant charges its wholesalers cannot be a substitute for the average retail price.

Plaintiff contends that the average retail price is unnecessary because individual damage calculations alone do not defeat class certification. (*See* Opp., pp. 10-11 (citing *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013)). In *Leyva*, the Ninth Circuit held that "the presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)." (*Id.*) In justifying this position, the appellate court understood that within a wage and hour context, a class of aggrieved employees may very well have individualized damages owed to them because not every class member gets paid the same rate or works the same amount of hours. Thus, "so long as the damages can be determined and attributed to a plaintiff's theory of liability, damage calculations for individual class members do not defeat certification." *Lindell v. Synthes USA*, No. 11-CV-02053-110-BAM, 2014 WL 841738, at

*14 (E.D. Cal. Mar. 4, 2014) (citing *Leyva*, 716 F.3d at 514).

Leyva is distinguishable. In *Leyva*, individualized damage calculations did not defeat certification because the plaintiffs had a workable damages model that matched their theory of liability. In the instant case, there simply is no evidence to calculate damages under Plaintiff's damages model is what stops the analysis. The absence of an average retail price makes it impossible to calculate damages either classwide or on an individual basis. Thus, the Court is presented with a full refund model that relies exclusively on Defendant's sales data, and that evidence alone does not suffice to calculate damages.

After a full opportunity to conduct discovery, Plaintiff has failed to produce the evidence needed under the full refund model. Moreover, Plaintiff has not presented an alternative damages model to address this impasse. The Court cannot allow this class to move forward if the damages model cannot be applied. *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 135-36 (S.D.N.Y. 2006) (denying certification because the plaintiffs' damages analysis was incomplete and defective).

Accordingly, because Plaintiff failed to provide the key evidence necessary to apply his classwide model for damages, the Court cannot find that common issues predominate under Rule 23(b)(3). Therefore, class decertification is warranted.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Decertify Class is GRANTED.

IT IS SO ORDERED.

Dated:
February 20, 2015

/s/ Andre Birotte Jr.
HONORABLE
ANDRE BIROTTE JR.
UNITED STATES
DISTRICT COURT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY LAMBERT, on Behalf of Themselves and All Others Similarly Situated, Plaintiff-Appellant, v. NUTRACEUTICAL CORP., Defendant-Appellee.	No. 15-56423 D.C. No. 2:13-cv-05942-AB-E Central District of California, Los Angeles ORDER (Filed Nov. 3, 2017)

Before: PAEZ, BERZON, and CHRISTEN, Circuit Judges.

The panel has voted to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION HONORABLE ANDRE BIROTTE, JR., U.S. DISTRICT JUDGE

FRANK ORTEGA AND TROY LAMBERT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, vs. NUTRACEUTICAL CORP., A DELAWARE CORPORATION, DEFENDANT.	No. CV 13-05942-AB-EX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, MARCH 2, 2015

10:10 A.M.

LOS ANGELES, CALIFORNIA

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LOS ANGELES, CALIFORNIA;
MONDAY, MARCH 2, 2014

[3] 10:10 A.M.

THE CLERK: Calling Item Number 3, CV 13-5942-AB, Frank Ortega, et al., versus Natural Balance, et al.

Counsel, please step forward and state your appearances.

MR. WESTON: Good morning, Your Honor. Greg Weston for the plaintiffs.

THE COURT: Good morning.

MR. HUESTON: Good morning, Your Honor. John Hueston and Steve Feldman of Hueston Hennigan for defendant, Nutraceuticals.

THE COURT: Good morning. If I understand correctly, we are here on a status conference. Obviously, the Court – I assume the parties have received the motion with respect to the decertification.

I guess the question – the first question that comes to mind, in light of that motion – I'm curious as to the parties' position whether or not this Court still has jurisdiction based on that because at least looking at – I think the last filing was the Second Amended Complaint. There was a – there may be – there exists diversity jurisdiction, but, looking at paragraph 18, it appears that [4] Mr. Lambert purchased the item approximately ten times at about $17 per bottle.

I wonder if we've reached the monetary amount. So I would be curious as to the parties' view relative to that.

MR. WESTON: Your Honor, my understanding is that diversity jurisdiction under the Class Action Fairness Act is established at the time the Complaint is filed based on the Complaint's allegation and the Court does not lose jurisdiction by denying class certification.

THE COURT: Is that your understanding, Mr. Hueston? I suspect you might have a different view.

MR. HUESTON: Well, the case law is actually not 100 percent clear on this. I do think the case law leans in favor of retained jurisdiction. We'll do a little more thinking on that, but I don't think there is a clear basis at this point.

THE COURT: All right. And then I guess moving forward – we vacated the trial date. I have some proposed dates, but I guess the question in my mind is have the parties talked in light of the ruling? Is there any opportunity or possibility for settlement in this matter? Or are we ready to proceed for trial?

MR. WESTON: Your Honor, I believe I would like to ask the Court now if we could have leave to file a renewed motion for class certification. And the reason is we do [5] have a damages model and support for it.

At the time that we filed our initial motion, we proposed a model and then later not all the facts that we needed to support that model came through the discovery process simply because it wasn't available in terms of the retail prices.

However, we can show in a renewed motion that there is very strong support in California law for a model based on the data we do have, which is the defendant's wholesale data. And that was the sole reason the Court decertified the class. And I think this is something that we could do in five pages, assuming we don't need to brief any other issues. And that would –

THE COURT: Let me let me ask you this, Mr. Weston: Where was this evidence before? I mean, is this something that's new that you just came up upon? Help me understand.

MR. WESTON: Well, we did point to it both in our summary judgment brief and in our opposition to the motion to decertify. It was hard to know – we didn't treat it in detail. It was hard to know exactly what issue the Court would find most persuasive because the defendants moved to decertify in a large number of issues, not just the one the Court granted the motion upon.

So I – would this not going to require any more [6] discovery? We have it. In fact, we've already briefed it a little bit, but it really is something that we have the information for, we have the support for, and it's simply a matter of providing the Court with this.

And, you know, just as the Court can decertify a class at any time, I think that the Court should at least consider our argument on why the information we have now is a viable model under California precedent for remedying the harm that defendant has caused many Californians.

THE COURT: All right. I'd like to hear from counsel for Nutraceutical.

Mr. Hueston, what's your position with respect to this?

MR. HUESTON: Well, we would oppose a renewed motion. The record is closed. That's part of what

the Court pointed out, that you made a very clear point of asking – or it was made clear at the earliest point in the course of the litigation that the damages model needed to be provided. It was not provided.

Of course, he can file a motion for reconsideration. That's different. That's based on the existing record. He doesn't get to renew a motion and bring in new models, figures, frankly, or anything else outside the record.

We'll also note, Your Honor, there were multiple [7] reasons for denying class certification here. It was our view that the Court chose the narrowest and strongest ground. Again, that could be considered in a motion for reconsideration. That would be the only vehicle, I think, that would be appropriate for plaintiffs at this time.

THE COURT: Mr. Weston, I tend to agree. Look. You are more than entitled to file a motion for reconsideration. That's entirely your right.

But, I guess, to the extent that you are contemplating it, which I suspect you will, I think you need to focus on what was in the existing record.

It sounds like you are suggesting that it may have been in the record. Obviously, the Court took a different view.

But feel free to file your motion for reconsideration, if that's what you desire. But, obviously, Mr. Hueston will be looking very carefully to make sure that it is not a new motion with newly – that tends to

bring out, at least from your perspective, some newly discovered evidence.

So you are absolutely entitled to so, and you can file your motion for reconsideration. I suggest you do it sooner than later because I had some proposed dates that I wanted to pose out to the parties because we've got cross motions for summary judgment, a pretrial conference, and a [8] trial date.

My proposal was to have summary judgment hearing on April 27th of 2015 with a pretrial conference in May – May 18th of 2015, and then a trial date of June. Throwing out those dates, do any of those dates cause any major complications for either side?

MR. WESTON: Your Honor, I would just say that we will want to file a motion for reconsideration. And in that respect, I think it makes sense to just hold summary judgment and trial in abeyance without a particular date unless the Court is confident it can rule in, you know, on – within a specified time on it.

And that's just in part because our summary judgment motion, for instance, you know, is predicated on there being a certified class. And we would have to at least supplement that at least a little bit in order to transform it into a individual summary judgment motion.

THE COURT: All right. Mr. Hueston, what is your position with respect to the proposed dates?

MR. HUESTON: Yes, Your Honor. The only one that gives me heartburn would be trial. I currently have a trial in Hawaii in June and then –

THE COURT: You would rather be in Los Angeles than Hawaii?

MR. HUESTON: Actually, I would rather be in [9] Los Angeles. It's not a good place to try a case out there, in Honolulu. I have one in June and another in late July. The earliest I could set a trial date would be September. They're both long trials.

So at at this point, Your Honor, I would agree with plaintiffs' suggestion to hold scheduling in abeyance on motion for summary judgment, pretrial, and trial, if we could do so.

THE COURT: Okay. All right. We can do that.

When do you anticipate filing your motion for reconsideration? And I don't mean to put you on the clock. I am just curious as to, sort of, the timing. Is this going to be in the next two to three weeks? Next week? Because I understand the parties' position about perhaps not setting the trial date, but I just don't want this to linger on in the meantime.

MR. WESTON: We certainly could have it within three weeks of today, if not sooner. If the Court prefers, we could rush it and get it done in two weeks without any real issue.

THE COURT: All right. I think in light of what you said – you have alluded to the fact that you believe that there is evidence – either existed in the existing motion. Seems to me you could get something on file no later than March the 12th, which would give you ten days [10] from today.

I don't think that's unreasonable. This way we can sort of resolve this issue and get this case back on calendar.

MR. WESTON: Your Honor, that would be fine. March 12th is no problem.

THE COURT: All right. So the motion for reconsideration will be filed on or before March 12th. And then the Court will then set dates once it's had an opportunity to review the motion.

I anticipate, obviously, because the Court dealt a lot of time into the existing motion, I don't think there will be as big a lag time trying to resolve this issue because we are sort of versed and attuned it to, but we'll set some dates after the motion for reconsideration.

MR. WESTON: Thank you, Your Honor. And I just – if it's all right with the Court, can we refer back to our prior class certification brief, sort of incorporated them –

THE COURT: It's part of the record; so absolutely.

MR. WESTON: That will just make the briefing a lot shorter. And I think that covers everything.

THE COURT: All right. Anything else from defense?

[11] MR. HUESTON: No. Thank you, Your Honor.

THE COURT: Thank you both for coming in. And I'll look forward to getting your papers on or before March the 12th.

MR. HUESTON: Thank you, Your Honor.

THE COURT: All right.

(Proceedings concluded at 10:20 p.m.)

-- oOo --

CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: March 18, 2015.

/S/ CHIA MEI JUI
Chia Mei Jui, CSR No. 3287

No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORPORATION,
Petitioner,

v.

TROY LAMBERT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Are nonjurisdictional claim-processing rules categorically immune to equitable exceptions?

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Oral Argument, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181. =0000030181 ..... 10, 11, 19

STATEMENT

This is a small case involving an issue of little wider concern, and is a poor vehicle for certiorari. The Question Presented is whether Federal Rule of Civil Procedure 23(f), a nonjurisdictional claim-processing rule, can be subject to an equitable exception in those rare circumstances where a Circuit Court of Appeals finds the facts warrant. This question, however, is premised on Petitioner Nutraceutical Corporation's ("Nutraceutical") assumption that the timing of Respondent Troy Lambert's ("Lambert") petition for permission to appeal violated Rule 23(f) in the first instance. *See* Pet. 3[1] (stating that Lambert "fail[ed] to timely file a Rule 23(f) petition or a motion for reconsideration within the fourteen-day window"); Pet. 6 (stating that "Lambert did not file a petition or a motion for reconsideration by [March 6, 2015]"); Pet. 7 (stating that Lambert's petition for permission to appeal was "filed more than four months late"). But Nutraceutical is incorrect, because its theory hinges entirely on the erroneous premise that Lambert's reconsideration motion was untimely. In fact, after the district court entered an order decertifying this class action, Lambert timely presented an oral motion for reconsideration to the district court at a status conference on March 2, 2015—10 days after the original decertification order—and followed up with a written motion for reconsideration on March 12, 2015—20 days after the original decertification order.

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[1] Nutraceutical's petition for a writ of certiorari is cited as "Pet. ___" and its appendix as "Pet. App. ___." The record for the 23(f) petition is cited as "CA Pet. Rec. ___" and "CA Rec. ___" for the case itself. The district court record is cited as "Dist. Ct. Rec. ___."

Lambert's request for reconsideration was therefore timely under the Federal Rules. *See* Fed. R. Civ. P. 7(b)(1) (providing that an oral motion can be made at a hearing); Fed. R. Civ. P. 59(e) (providing that "[a] motion to alter or amend a judgment" can be filed "no later than 28 days after the entry of the judgment"); *see also* Fed. R. Civ. P. 54(a) (defining "judgment" as "any order from which an appeal lies"); Fed. R. Civ. P. 23(f) (providing for "an appeal from an order granting or denying class-action certification"). (Besides timely under these federal rules, it was also filed on the day specified by the district court.) Thus, the Question Presented is actually not presented, because Lambert's reconsideration motion and appeal were timely under any standard. Certiorari should therefore be denied.

The relevant facts are as follows. In 2013, Lambert, on behalf of himself and others similarly situated, filed suit alleging that Nutraceutical violated California consumer fraud law with the sale of its Cobra Sexual Energy pill. Pet. App. 53. In 2014, the district court granted class certification. Pet. App. 28. After the initial district judge's retirement and the case's reassignment, Nutraceutical moved to decertify on a number of grounds. Pet. App. 4. On February 20, 2015, the district court granted the motion, rejecting some of Nutraceutical's arguments, but agreeing that the plaintiff had failed to accumulate evidence sufficient to calculate restitution under California law. Pet. App. 4. At a status conference on March 2, 2015—10 days later—Lambert asked the district court to recertify the class, outlining the evidence that had been adduced with respect to damages, and requesting leave to present that evidence in written form. Pet. App. 5; Pet. App. 14; Pet. App. 71-76. The district court set a

briefing and hearing schedule for that motion. Pet. App. 76. In accordance with the district court's order and Federal Rule of Civil Procedure 59(e), Lambert filed the motion for reconsideration on March 12, 2015, the date set by the district court, and 20 days after the decertification order. Pet. App. 5; Dist. Ct. Rec. 183.

On June 24, 2015, the district court denied Lambert's motion for reconsideration. Pet. App. 27-51. The district court recognized the reconsideration motion as a motion under Rule 59(e), and invoked the Rule 59(e) standards in deciding the motion. Pet. App. 29-31. Although it did not recertify the class as Lambert hoped, it modified its prior order in agreement with one of Lambert's arguments: that the decertification order erred by not providing for notice of decertification to the class. Pet. App. 49-50. Fourteen days later, Lambert petitioned the Ninth Circuit for permission to appeal under Rule 23(f), which was granted. Pet. 7; CA Pet. Rec. 1; Pet. App. 6. After briefing and oral argument, the Ninth Circuit: (i) concluded that the appeal was timely; and (ii) reversed the district court's decertification because it involved a misapplication of California restitution law. Pet. App. 1-26. Nutraceutical now seeks this Court's review of the Ninth Circuit's timeliness conclusion, but does not challenge the Ninth Circuit's decision on the merits.

Certiorari should be denied. The Question Presented—i.e., whether Rule 23(f) can be subject to equitable exceptions—is premised on the assumption that the timing of Lambert's petition for permission to appeal ("Lambert's appeal") required the fourteen-day time period in Rule 23(f) to be equitably tolled. While

the Ninth Circuit was correct in finding that under the circumstances, equitable tolling was appropriate, it need not have reached the issue.

First, in at least three independent ways, Lambert timely sought reconsideration of the district court's decertification order. Lambert's March 2, 2015 oral request for the district court to revisit its February 20 decertification order (along with his reasons for so requesting) constituted a "motion" under Federal Rule of Civil Procedure 7(b)(1). Moreover, Lambert's March 12, 2015 written motion for reconsideration was filed well within the 28-day timeframe for filing a motion under Federal Rule of Civil Procedure 59(e). Under this Court's longstanding case law, such timely motions for reconsideration cause the deadline to appeal to run from the date that the district court disposes of the reconsideration motion—not the date of the original decision. Additionally, Federal Rule of Civil Procedure 23(c)(1)(C) provides that a certification decision "may be altered or amended before final judgment." The district court's June 24, 2015 denial of reconsideration "altered or amended" its previous order by both discussing in more detail the reasons for decertification, and also by correcting the prior order's failure to provide for notice of decertification. Pet. App. 50; *see also* Pet. App. 6 (recognizing that "the [reconsideration] order set forth a plan for notifying the class regarding decertification"). Because Lambert's petition for permission to appeal was filed on July 8, 2015—within 14 days of the district court's June 24, 2015 denial of reconsideration—the appeal was timely without the need to invoke any equitable exceptions.

Second, Nutraceutical forfeited and waived its right to argue that Lambert's March 12, 2015 motion for reconsideration was untimely, and that Rule 23(f) is insusceptible to equitable exceptions. At the March 2 status conference, the district court set a March 12 deadline for Lambert file a written motion for reconsideration, and Nutraceutical did not object to this timing, despite being given an opportunity to comment. Pet. App. 76-77. Nor did Nutraceutical object to the timing in its opposition to Lambert's motion for reconsideration. Dist. Ct. Rec. 189. Instead, Nutraceutical waited until after the district court decided the motion on the merits. CA Pet. Rec. 7-1; CA Rec. 15. Therefore, Nutraceutical cannot now be heard to argue that the motion was untimely. Moreover, during oral argument before the Ninth Circuit, Nutraceutical expressly stated that Rule 23(f) can be subject to equitable considerations such as the unique-circumstances doctrine, and therefore forfeited and waived the right to argue to this Court that nonjurisdictional claim-processing rules are categorically immune to equitable exceptions.

Third, the facts of this case do not implicate any circuit conflict. Nutraceutical's cited cases mostly involve motions for reconsideration that were filed well outside the deadline for filing a motion under Rule 59(e). There is no indication from any of these cited cases that any other circuit would have dismissed Lambert's appeal as untimely, given that Lambert's motion for reconsideration was filed well within the Rule 59(e) timeframe, and Lambert's appeal was filed within 14 days of the denial of the motion for reconsideration. Fed. R. Civ. P. 23(f). Nor did any of these cases squarely address the question of whether

claim-processing rules such as Rule 23(f) are subject to equitable exceptions. Therefore, this case presents no circuit conflict for this Court to resolve.

Fourth, the Federal Rules and this Court's longstanding case law—as well as case law from the courts of appeals—confirm that nonjurisdictional claim-processing rules in the Federal Rules are generally subject to equitable exceptions. As this Court has long recognized, the Federal Rules are designed to facilitate disposition of cases on the merits. Nothing in this Court's precedents (or in cases from the courts of appeals) supports Nutraceutical's proposed rule that claim-processing rules are categorically immune to equitable exceptions.

In sum, the Ninth Circuit's judgment represents a straightforward and correct application of this Court's precedents and the Federal Rules, and no other court of appeals would rule differently if faced with the facts presented here. Moreover, because Lambert's appeal was timely under the Federal Rules and this Court's precedents—and because Nutraceutical forfeited and waived the right to argue to the contrary—this case presents no need to consider whether nonjurisdictional rules are subject to equitable exceptions. Therefore, this case is an unsuitable vehicle for deciding the Question Presented, and the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. This Case Is a Poor Vehicle Because Several Antecedent Legal Principles Resolve the Case Without Reaching the Question Presented

A. Lambert's Appeal Was Timely Under the Federal Rules and This Court's Longstanding Precedents, thus Presenting No Need to Consider Any Equitable Exceptions

The Question Presented—i.e., whether mandatory claim-processing rules can be subject to equitable exceptions—is premised on the assumption that the timing of Lambert's appeal violated Federal Rule of Civil Procedure 23(f). But this assumption is incorrect. *First*, at a status conference held 10 days after the district court's decertification order, Lambert orally presented the district court with reasons why the class should be recertified. This presentation constitutes an oral motion under the Federal Rules of Civil Procedure. Therefore, even under Nutraceutical's apparent view that a reconsideration motion must be filed within 14 days of the decertification order in order to postpone the period to seek appellate review under Rule 23(f), Lambert's appeal was timely. *Second*, Lambert's written motion for reconsideration was filed 20 days after the decertification order, and was therefore timely under Federal Rule of Civil Procedure 59(e). Under the Federal Rules and this Court's precedents, such a timely motion causes the time to appeal to run from the disposition of the reconsideration motion, not from the original order. Because Lambert's appeal was filed within 14 days of the district courts' disposition of the

reconsideration motion, the appeal was timely. *Third*, Federal Rule of Civil Procedure 23(c)(1)(C) provides that a certification decision "may be altered or amended before final judgment." The district court's June 24, 2015 denial of reconsideration altered its previous order by providing instructions about notifying the class about the decertification. Because Lambert's petition for permission to appeal was filed on July 8, 2015—within 14 days of the district court's June 24, 2015 denial of reconsideration—the appeal was timely without the need to invoke any equitable exceptions.

1. Lambert Timely Moved for Reconsideration at the March 2, 2015 Hearing

At the district court's status conference on March 2, 2015, Lambert orally outlined the reasons why the district court should recertify the class. Pet. App. 71-72. In other words, Lambert presented an oral motion seeking the district court's reconsideration of the decertification order. Oral motions are permitted if "made during a hearing or trial." Fed. R. Civ. P. 7(b)(1)(A). As the Ninth Circuit recognized, Lambert, at the March 2 hearing, "informed the court of his intention to file a motion for reconsideration" and "explained that he had a damages model and evidentiary support for it." Pet. App. 5; *see also* Pet. App. 13-14. Accordingly, even if this Court were to accept Nutraceutical's argument that Lambert's motion for reconsideration had to be filed within 14 days of the district court's decertification order (which it should not, as explained below), Lambert's March 2, 2015 oral motion—made 10 days after the decertification

order—was timely even under Nutraceutical's proposed standard. Therefore, Lambert's time to appeal began to run on June 24, 2015—when the district court disposed of the reconsideration motion. Because Lambert's appeal was in full compliance with the Federal Rules, this case presents the Court with no need to consider whether nonjurisdictional claim-processing rules are subject to equitable exceptions.

2. Lambert's March 12, 2015 Motion for Reconsideration Was Timely Under Federal Civil Rule 59(e)

The district court's February 20, 2015 decertification order constitutes a "judgment" within the meaning of the Civil Rules, because it is "an[] order from which an appeal lies." Fed. R. Civ. P. 54(a); *see also* Fed. R. Civ. P. 23(f) (providing that a court of appeals may permit "an appeal from an order granting or denying class-action certification"). And under Federal Rule of Civil Procedure 59(e), a party may move to alter or amend a judgment "no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e).[2] Lambert's motion for reconsideration was filed on March 12, 2015—20 days after the district court's decertification order, and therefore well within the 28-day timeframe set forth in Rule 59(e). Accordingly, as explained in more detail below, the motion for reconsideration postponed the time to appeal, and Lambert's appeal was therefore due within 14 days of the denial of the motion for reconsideration,

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[2] Until 2009, this 28-day deadline was instead a 10-day deadline. Similarly, until 2009, there was a 10-day deadline to file a petition for permission to appeal under Rule 23(f).

and was filed within this time. Because Lambert's petition was timely filed, this Court would have no reason to consider any equitable exceptions in order to affirm the Ninth Circuit's judgment.

A motion falls under Rule 59(e) "where it involves 'reconsideration of matters properly encompassed in a decision on the merits.'" *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989) (quoting *White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 451 (1982)). Here, Lambert's motion for reconsideration asked the district court to vacate its decertification order (i.e., the order giving rise to an interlocutory appeal under Rule 23(f)), and recertify the class. The motion for reconsideration was therefore a Rule 59(e) motion, and indeed, the district court recognized it as such. Pet. App. 29 (recognizing that "a motion for reconsideration brought within 28 days of the entry of judgment is treated as a motion under Rule 59(e)" and invoking the standards under Rule 59(e) in deciding Lambert's motion for reconsideration); *see also McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (recognizing that a motion for reconsideration of an order denying class certification is a Rule 59 motion).

As many courts have recognized, Rule 59(e) applies not only to final judgments, but also to interlocutory orders from which an appeal could lie. The Ninth Circuit recognized as much during oral argument here, and at least twice suggested that Lambert's reconsideration motion was in accordance with Rule 59. Oral Argument at 2:36-38 and 14:15-36, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/

view.php?pk_id=0000030181. Additionally, the First Circuit held that a motion for reconsideration of an appealable interlocutory order constituted a Rule 59(e) motion because the underlying order was "an order from which an appeal lies" under Rule 54(a). *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7-8 (1st Cir. 2005). Accordingly, the First Circuit held the time to appeal ran from the disposition of the reconsideration motion, not from the date of the original order. *Id.* Other decisions are in accord. *See, e.g.*, *Auto Servs. Co. v. KPMG, LLP*, 537 F.3d 853, 856 (8th Cir. 2008) (noting that for purposes of Civil Rules 54(a) and 59(e) and Appellate Rule 4(a)(4)(A)(iv), a "'judgment' encompasses both a final judgment and an appealable interlocutory order"); *Robertson v. Monsanto Co.*, 287 F. App'x 354, 358 (5th Cir. 2008) (applying the definition of "judgment" set forth in Rule 54(a) to interlocutory appeals under Rule 23(f)); *Lichtenberg v. Besicorp Grp. Inc.*, 204 F.3d 397, 400-01 (2d Cir. 2000) (recognizing that a "judgment" under the Civil Rules encompasses both a final judgment and an appealable interlocutory order); *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989) (same); *Rodriguez v. Banco Cent.*, 790 F.2d 172, 175-76 (1st Cir. 1986) (finding that Rule 59(e) applies to interlocutory orders based on Rule 54(a) and noting that "[l]ittle purpose would be served in penalizing a party for requesting a district court to reconsider a disputed interlocutory ruling before attempting to take its grievance to the court of appeals"). Here, the district court's decertification order constitutes an "order granting or denying class-action certification" from which "[a] court of appeals may permit an appeal" and is therefore "an order from which an appeal lies." Fed. R. Civ. P. 23(f); Fed. R. Civ. P. 54(a). Lambert's motion for reconsideration of the

decertification order therefore was a timely motion under Rule 59(e).

3. Because Lambert's Reconsideration Motion Was Timely, He Had Until July 8, 2015 to File His Rule 23(f) Petition

This Court has long held that a timely filed motion for reconsideration causes the time to appeal to run from the disposition of the reconsideration motion. For instance, this Court summarily reversed the Tenth Circuit for concluding that a motion for rehearing did not toll the time to appeal and dismissing the appeal as untimely, and recognized that in both civil and criminal cases, "a motion for rehearing . . . renders an otherwise final decision of a district court not final until it decides the petition for rehearing." *United States v. Ibarra*, 502 U.S. 1, 6 (1991). Under this rule, "district courts are given the opportunity to correct their own alleged errors, and allowing them to do so prevents unnecessary burdens being placed on the courts of appeals." *Id.* at 5. Indeed, it has been "the consistent practice in civil and criminal cases alike . . . to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending." *United States v. Dieter*, 429 U.S. 6, 8 (1976). In recognizing this principle, this Court dismissed the Tenth Circuit's "concern with the lack of a statute or rule expressly authorizing treatment of a [reconsideration] motion as suspending the limitation period[,]" and instead concluded that it has been a "'traditional and virtually unquestioned practice'" for the time to appeal to run from the disposition of a timely reconsideration motion. *Id.* at 8,

8 n.3 (quoting *United States v. Healy*, 376 U.S. 75, 79 (1964)); *see also Healy*, 376 U.S. at 80 (recognizing "the ordinary rule" that an appeal need not be filed while a petition for rehearing is under consideration); Fed. R. App. P. 4(a)(4)(A)(iv) (providing that where a timely motion has been filed under Rule 59, "the time to file an appeal runs for all parties from the entry of the order disposing of" that motion); *Gelder v. Coxcom Inc.*, 696 F.3d 966, 970-971 (10th Cir. 2012) (O'Brien, J., concurring) (recognizing that the timely filing of a motion listed in Appellate Rule 4(a)(4)(A) postpones the time to petition for permission to appeal under Rule 23(f)).

Because Lambert filed his reconsideration motion on March 12, 2015—well within the 28-day period following the district court's February 20, 2015 decertification order—the reconsideration motion was timely under Rule 59(e). The February 20 decertification order therefore did not become final until June 24, 2015, when the district court disposed of the reconsideration motion. The 14-day period for Lambert to petition for permission to appeal under Rule 23(f) therefore did not begin to run until June 24, 2015. Accordingly, Lambert's July 8, 2015 petition for permission to appeal—filed 14 days after the June 24 order—was timely. Fed. R. Civ. P. 23(f) (providing that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered").

Because Lambert's appeal was timely under the Federal Rules and under this Court's longstanding

precedents, the Ninth Circuit's judgment can be affirmed on that basis. This case, therefore, "involves no issue of equitable tolling or any other equity-based exception." *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004).

Nor does this case involve any violation of Appellate Rule 26(b)(1), contrary to Nutraceutical's argument. Pet. 18-20. Rule 26(b)(1), in relevant part, prohibits a court from extending the time for filing a petition for permission to appeal. Fed. R. App. P. 26(b)(1). But here, neither the Ninth Circuit nor the district court extended the time for Lambert to petition for permission to appeal. Rather, assuming *arguendo* that Lambert ordinarily would have been required to file a written motion for reconsideration within 14 days of the decertification order,[3] the district court simply gave Lambert a six-day extension of time (from March 6, 2015 to March 12, 2015) to file the motion. Nothing in the Federal Rules prohibits a court from extending the time to file a motion for reconsideration. *See* Fed. R. App. P. 26(b)(1) (listing time periods that cannot be extended); Fed. R. Civ. P. 6(b)(2) (same). Therefore, because Lambert filed the motion within the time set by the district court, the motion for reconsideration was timely, and the time to appeal ran from the district court's disposition of the motion. *Ibarra*, 502 U.S. at 6; *Dieter*, 429 U.S. at 8; *Healy*, 376 U.S. at 80. Because Lambert filed his Rule 23(f) petition for permission to appeal on July 8, 2015—within 14 days of the district court's June 24, 2015 denial of reconsideration—Lambert's appeal was timely.

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[3] As explained in detail above, Lambert was not, in fact, subject to a 14-day deadline to move for reconsideration.

Simply put, Lambert's appeal was timely under the Federal Rules and this Court's precedents, so there is no need to consider any equitable exceptions. Accordingly, this case is a poor vehicle because it does not afford this Court the opportunity to decide the Question Presented.

4. Lambert's Appeal Was Also Timely Based on the Plain Language of Rule 23

A certification decision "may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). The district court's initial decertification order (Pet. App. 27-51) was defective because it did not provide a plan for notice of class decertification. *See* Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(c)(3)(B). The district court's June 24, 2015 denial of reconsideration altered its previous order by dealing, as was required, with notice to the class of the decertification. Pet. App. 50. Accordingly, because Lambert filed his Rule 23(f) petition for permission to appeal within 14 days of the district court's altered decertification order, the Rule 23(f) petition was timely, without the need to consider any equitable exceptions.

More broadly, the order denying reconsideration of the decertification simply falls into the category of "an order granting or denying class-action certification." Fed. R. Civ. P. 23(f). In substance, the motion, had it been granted, would have created a certified class that had been previously decertified. The district court denied the motion, so its order was thus "an order . . . denying class-action certification." *Id.* Because a Rule 23(f) petition for permission to appeal is due "within 14 days after the order [denying class-action

certification] is entered," *id.*, and Lambert's petition was filed on July 8, 2015—within that timeframe—Lambert's appeal was timely under the plain language of Rule 23(f). As squarely as the reconsideration order here falls within Rule 23(f)'s language, other Circuit Courts have applied it more expansively, to orders modifying the scope of the class, or decertifying a class. For instance, in *Glover v. Standard Fed. Bank*, 283 F.3d 953, 956-58 (8th Cir. 2002), the decision "granting or denying class-action certification" was an order that changed the class definition of an earlier-certified class.

B. Nutraceutical's Multiple Acts of Forfeiture and Waiver Are Obstacles to Consideration of the Question Presented

Although Lambert's appeal was timely under the Federal Rules and this Court's precedents for the reasons discussed above, certiorari should also be denied because Nutraceutical, through its actions and omissions in the district court and in the Ninth Circuit, forfeited and waived its right to argue: (i) the Question Presented; and (ii) that the reconsideration motion was untimely. These acts of forfeiture and waiver make this case an unsuitable vehicle.

1. Nutraceutical Committed Forfeiture and Waiver Before the District Court

At the March 2, 2015 status conference—within 14 days from the district court's original decertification order—the district court set a deadline of March 12, 2015 for Lambert to file a motion for reconsideration. Pet. App. 76. When given an opportunity to raise any concerns prior to adjournment of the conference,

Nutraceutical raised none. Pet. App. 77. Because Nutraceutical declined to raise any objection to the briefing schedule, it "wait[ed] too long to raise the point" and therefore forfeited any argument that the March 12, 2015 reconsideration motion was untimely. *Kontrick*, 540 U.S. at 456. Moreover, Nutraceutical's express decision not to raise any concerns at the status conference when given the opportunity to do so constitutes an "intentional relinquishment or abandonment of a known right" (*id.* at 458 n.13) and is therefore a waiver of the right to argue that the reconsideration motion—filed within the time set by the district court at the status conference—was out of time.

Additionally, Nutraceutical forfeited its right to argue that the reconsideration motion was untimely because in its opposition to the motion for reconsideration, Nutraceutical raised no timeliness objection to the district court, instead raising its objections for the first time before the Ninth Circuit after the district court ruled on the reconsideration motion. Nutraceutical's failure to raise any objection to the timeliness of the motion until after the motion was decided on the merits constitutes a forfeiture of Nutraceutical's timeliness objection. *See Eberhart v. United States*, 546 U.S. 12, 18-19 (2005) (finding that the Government had forfeited an objection to a motion that was untimely under the Federal Rules where no objection was raised until after the district court decided the motion on the merits); *Kontrick*, 540 U.S. at 447 (finding a forfeiture of the right to assert untimeliness of a claim where no objection to timeliness was raised until after the claim was adjudicated on the merits).

At least two courts of appeals have found forfeiture in circumstances similar to those here. For example, when a Rule 59(e) motion was untimely filed without objection from the appellee but the appellee later claimed that the untimely motion failed to suspend the time to appeal, the D.C. Circuit: (i) found a forfeiture of the timeliness objection; and (ii) concluded that this forfeiture precluded any argument that the Rule 59(e) motion did not suspend the time to appeal. *Obaydullah v. Obama*, 688 F.3d 784, 788-91 (D.C. Cir. 2012);[4] *see also Nat'l Ecological Found. v. Alexander*, 496 F.3d 466, 475-76 (6th Cir. 2007) (finding that the forfeiture of a timeliness objection to a Rule 59(e) motion meant that the Rule 59(e) motion tolled the time to appeal and "discern[ing] no reason for holding that an otherwise properly filed motion that was considered by the district court would fail to toll the time for filing a notice of appeal"); *In re Onecast Media, Inc.*, 439 F.3d 558, 562-63 (9th Cir. 2006) (finding forfeiture of an argument that a reconsideration motion was untimely and adjudicating the case on the merits).

2. Nutraceutical Committed Forfeiture and Waiver Before the Ninth Circuit

During oral argument before the Ninth Circuit, Nutraceutical expressly stated that Rule 23(f) can be subject to equitable considerations such as the unique-

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[4] Although Fed. R. App. P. 4(a)(4)(A) was subsequently amended on December 1, 2016 to no longer permit untimely motions listed in Rule 4(a)(4)(A) to toll the time to appeal, the relevant events here (i.e., the decertification order, the motion for reconsideration, and the Civil Rule 23(f) petition) all took place in 2015, and are therefore governed by the pre-2016 version of the Appellate Rules.

circumstances doctrine. In particular, Nutraceutical recognized that with respect to Rule 23(f), a court has the "power to exercise its equitable powers" through doctrines such as the unique-circumstances doctrine. Oral Argument at 24:14-28, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181. Accordingly, Nutraceutical forfeited and waived the right to argue—as it does throughout its petition—that nonjurisdictional claim-processing rules in general (and Rule 23(f) specifically) are insusceptible to equitable exceptions. Simply put, because Nutraceutical admitted that Rule 23(f) can be subject to equitable exceptions, Nutraceutical cannot now be heard to argue to the contrary. Indeed, the Ninth Circuit's recognition that nonjurisdictional rules can be subject to equitable exceptions is entirely consistent with Nutraceutical's statement during oral argument. Nutraceutical's statement constitutes forfeiture and waiver of its right to argue the Question Presented, thus making this case an unsuitable vehicle.

In sum, Nutraceutical forfeited and waived the right to argue: (i) the Question Presented; and (ii) that Lambert's reconsideration motion was untimely—an assumption on which the Question Presented is based. Nutraceutical's forfeiture and waiver resolve this case, without the need to consider whether claim-processing rules are subject to equity-based exceptions. *See Kontrick*, 540 U.S. at 457-58. Because there are multiple obstacles to reaching the Question Presented, this case is a poor vehicle. Consequently, certiorari should be denied.

C. Given the Unique Posture of This Case, a Decision Regarding the Timeliness of the Appeal Is Unlikely to Have Any Effect on the Outcome of the Case

This case is in a unique posture. Since the Ninth Circuit accepted Lambert's appeal, the district-court case has been stayed, and no final judgment has been issued. Moreover, the Ninth Circuit concluded that Lambert's appeal was timely, and then reversed the district court's decertification order on the merits because the decertification order was legally erroneous on a matter of California substantive law. If this Court concluded that Lambert's appeal should have been dismissed as untimely, the case would return to the district court, which would then have the benefit of the Ninth Circuit's opinion concluding that the decertification order was erroneous. Although the Ninth Circuit's decision would not be controlling if vacated by this Court as untimely,[5] it would nevertheless be persuasive authority on the merits. Under these circumstances, the district court likely would simply recertify the class given the Ninth Circuit's guidance.[6] *See* Fed. R. Civ. P. 23(c)(1)(C) (providing that a certification decision "may be altered or amended before final judgment"); *see also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 479 n.9 (2013) (district courts may alter or amend class-

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[5] Nutraceutical did not seek this Court's review of the Ninth Circuit's decision on the merits.

[6] Indeed, if the district court failed to recertify the class, the Ninth Circuit almost certainly would reverse when the case returns to the Ninth Circuit after entry of judgment.

certification orders "based on circumstances developing as the case unfolds"); *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.").

Because a decision regarding the timeliness of Lambert's interlocutory appeal is highly unlikely to affect the ultimate outcome of this case, this Court should deny certiorari.

II. This Case Does Not Implicate Any Circuit Conflict

As discussed above, Lambert's reconsideration motion was timely under Rule 59(e), and the time to petition for permission to appeal under Rule 23(f) therefore ran from June 24, 2015, when the district court disposed of the motion. The cases cited by Nutraceutical that purportedly establish a circuit conflict do not involve reconsideration motions filed within the deadline set by Rule 59(e) (such as Lambert's motion for reconsideration here), and are therefore factually distinguishable from this case:

- *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193-94 (3d Cir. 2008): The Third Circuit found a Rule 23(f) petition for permission to appeal to be untimely because the January 19, 2007 motion for reconsideration was filed 30 days after the order denying class certification. Unlike here, the reconsideration motion was therefore filed far outside the then-applicable 10-day period for filing a Rule 59(e) motion or a Rule 23(f) petition. *Gutierrez* therefore had no

occasion to consider whether a timely reconsideration motion under Rule 59(e) suspends the period to petition for permission to appeal under Rule 23(f).

- *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 30-31 (2d Cir. 2011): The Second Circuit found a Rule 23(f) petition to be untimely where, unlike here, the petition was filed "more than eighteen months after Rule 23(f)'s deadline for interlocutory appeals" and was untimely even when the deadline was calculated from the date of the reconsideration decision.

- *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014): The Fourth Circuit found a Rule 23(f) petition to be untimely when based on a fourth motion for decertification, filed two years after the original certification order, and therefore, unlike here, far outside the time period permitted by Rule 59(e).

- *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1290-91 (11th Cir. 2007): The Eleventh Circuit found a Rule 23(f) petition to be untimely where, unlike here: (i) the initial petition for permission to appeal was filed outside the then-applicable 10-day deadline under Rule 23(f) and (ii) no reconsideration motion was filed; but (iii) the district court simply vacated and reentered its order for purposes of re-starting the appeal clock. The Eleventh Circuit rejected the district court's attempt to circumvent Rule 23(f) by simply vacating and reentering its order.

- *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1192 (10th Cir. 2006): The Tenth Circuit dismissed a Rule 23(f) appeal as untimely where, unlike here, the relevant reconsideration motion was filed many months after the challenged district-court orders—far outside the time permitted by Rule 59(e). No equitable considerations were invoked.

- *Coco v. Inc. Vill. of Belle Terre, New York*, 448 F.3d 490, 491-92 (2d Cir. 2006): The Second Circuit denied a Rule 23(f) petition as untimely where, unlike here, the party simply filed the petition for permission to appeal out of time. No reconsideration motion was involved, and no equitable considerations were invoked.

- *McNamara v. Felderhof*, 410 F.3d 277, 279 (5th Cir. 2005): The Fifth Circuit dismissed a Rule 23(f) petition as untimely where, unlike here, the motion for reconsideration was filed more than two months after the order denying class certification—well outside the time permitted by Rule 59(e).

- *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004): The Tenth Circuit denied a Rule 23(f) petition where, unlike here, the petitioner simply missed the Rule 23(f) deadline, and the district court—in violation of Appellate Rule 26(b)—purported to grant an extension of time to appeal. The case involved no reconsideration motion.

- *Gary v. Sheahan*, 188 F.3d 891, 892-93 (7th Cir. 1999): The Seventh Circuit dismissed a Rule 23(f) petition as untimely where the "belated motion for reconsideration" was filed more than one year after the challenged district-court order—far outside the Rule 59(e) deadline.

In sum, nothing in Nutraceutical's cited cases: (i) suggests that any court would have found Lambert's appeal to be untimely; or (ii) decides whether nonjurisdictional claim-processing rules can be subject to equitable exceptions. Put differently, Nutraceutical's cited cases are fully reconcilable with the Ninth Circuit's conclusion that Lambert's appeal was timely. This case therefore does not present the Court with any circuit conflict to resolve.

III. The Ninth Circuit Correctly Recognized that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

As explained in detail above, the timing of Lambert's appeal was in full compliance with the Federal Rules, thus presenting this Court with no need to consider whether equitable exceptions can apply to nonjurisdictional claim-processing rules such as Rule 23(f). Nevertheless, the Ninth Circuit's recognition that such rules can be subject to equitable exceptions (*see* Pet. App. 10) is fully in accord with this Court's longstanding precedents and precedents from lower courts, which confirm that equitable exceptions can apply to nonjurisdictional claim-processing rules. None of Nutraceutical's cited cases—and none that Lambert could locate—hold to the contrary. Therefore, certiorari should be denied.

A. This Court's Precedents Demonstrate that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

This Court has long recognized equitable exceptions to provisions set forth in the Federal Rules. Especially illustrative is this Court's longstanding principle that a timely filed motion for reconsideration postpones the time to appeal, even when there is no "statute or rule expressly authorizing treatment of a [reconsideration] motion as suspending the limitation period[.]" *Dieter*, 429 U.S. at 8 n.3; *accord Ibarra*, 502 U.S. at 6; *Healy*, 376 U.S. at 80. The fact that this exception is so well-accepted by this Court—and has been for many decades—demonstrates that the Rules cannot be construed in the rigid and unyielding manner that Nutraceutical seeks.

Other decisions from this Court further demonstrate that the Rules are subject to equitable exceptions. For instance, in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964), a party's motion for a new trial was belatedly filed, but the district court assured him that the motion was filed "in ample time." *Thompson*, 375 U.S. at 386. The party filed a notice of appeal within 60 days of the district court's disposition of the motion for a new trial, but not within 60 days of the original judgment. *Id.* at 384-86. Had the motion actually been filed "in ample time," the time to file a notice of appeal would not have begun to run until the district court disposed of the motion. *Id.* at 385-86. However, because the motion was untimely, the filing of the motion did not toll the time to appeal.

Id. The Seventh Circuit therefore dismissed the appeal as untimely. *Id.* at 387.

This Court reversed in view of the "unique circumstances" and directed the Seventh Circuit to consider the appeal on the merits. *Id.*; *see also Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962) (recognizing the "unique-circumstance doctrine," an equitable exception to the notice-of-appeal timing requirement); *accord Osterneck*, 489 U.S. at 179; *Wolfsohn v. Hankin*, 376 U.S. 203, 203 (1964) (summarily reversing the dismissal of an appeal, based upon the reasoning in *Harris Truck Lines* and *Thompson*). Here, even if Lambert's appeal ordinarily would be deemed to be untimely (which it should not be, as discussed in detail above), *Thompson* dictates that because the district court orally assured Lambert that a reconsideration motion could be filed by March 12, 2015, the time to appeal ran from the district court's disposition of the March 12 reconsideration motion, and the present appeal was properly adjudicated on the merits.

Although this Court in *Bowles v. Russell*, 551 U.S. 205 (2007) overruled *Harris Truck Lines* and *Thompson* "to the extent they purport to authorize an exception to a jurisdictional rule," *Bowles* did not overrule these cases as applied to nonjurisdictional time prescriptions. *Bowles*, 551 U.S. at 214; *see also Mobley v. C.I.A.*, 806 F.3d 568, 577 (D.C. Cir. 2015) (citations omitted).[7] Indeed, the D.C. Circuit recently

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[7] As correctly concluded by the Ninth Circuit (and unchallenged by Nutraceutical), the 14-day deadline in Rule 23(f) is nonjurisdictional because it does not appear in a statute. Pet.

applied the unique-circumstances doctrine to excuse the untimely filing of a post-judgment motion. *Mobley*, 806 F.3d at 577-78; *see also Khan v. U.S. Dep't of Justice*, 494 F.3d 255, 258-60 (2d Cir. 2007) (concluding that *Bowles* did not alter the ability of a court to recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950.1 (4th ed. Apr. 2018 update) (recognizing that a nonjurisdictional time period "should be subject in appropriate cases to the 'unique circumstances' doctrine"). Application of the unique-circumstances doctrine to nonjurisdictional time prescriptions is fully consistent with this Court's precedents. As Justice Ginsburg explained, this Court's decisions in *Thompson* and *Harris Truck Lines* are "based on a theory similar to estoppel," and time limits found in the Federal Rules should be treated like "[t]ime requirements in lawsuits," which "are customarily subject to 'equitable tolling.'" *Carlisle v. United States*, 517 U.S. 416, 435-36 (1996) (Ginsburg, J., concurring) (quoting 4A Wright & Miller, Federal Practice & Procedure § 1168, at 501); *see also Bowles*, 551 U.S. at 216 (Souter, J., dissenting) (recognizing that nonjurisdictional time limitations "may be waived or mitigated in exercising reasonable equitable discretion[]").

App. 10; *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 (2017) ("If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional, . . . otherwise, the time specification fits within the claim-processing category."); Fed. R. Civ. P. 82 (providing that the Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts").

This Court's decision in *Schacht v. United States*, 398 U.S. 58 (1970) is also instructive. There, the petitioner filed a petition for a writ of certiorari outside the time period permitted by the Rules of this Court, and the Government argued that the Court could not consider the merits of the petition because the time period in the Rules cannot be waived. *Schacht*, 398 U.S. at 63. Rejecting the Government's view, this Court explained that the time period to file a petition for a writ of certiorari in a criminal case is not a jurisdictional rule, and that the Rule "contains no language that calls for so harsh an interpretation." *Id.* at 63-64. Rather, the Court explained that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64; *see also Bowles*, 551 U.S. at 212.

These cases are consistent with this Court's longstanding recognition that cases should not turn on technicalities in the notice-of-appeal context. For instance, in rejecting the notion that a defect in a notice of appeal was fatal to the appeal, this Court concluded that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962). Similarly, although Appellate Rule 3 requires a "notice of appeal" in order to seek appellate review of a district-court decision and sets forth specific requirements for the notice, this Court held that a document that does not strictly comply with Rule 3 (such as a brief filed in lieu of a proper notice of appeal) can sometimes suffice. *Smith v. Barry*, 502 U.S. 244, 248-50 (1992); *see also Becker v. Montgomery*, 532 U.S. 757, 768 (2001) (concluding that

an appellant's failure, in violation of the Rules, to sign a notice of appeal was not fatal to the appeal, and finding that the court of appeals should have accepted the appellant's corrected notice of appeal); *cf. Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (recognizing, in the class-action context, that "finality [for purposes of appeal] is to be given a practical rather than a technical construction"); *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 387 (1978) (refusing to give the separate-judgment requirement an interpretation that would defeat a party's appellate rights "where the notice did not mislead or prejudice the appellee") (internal quotation marks omitted). Because the Rules are designed to maximize the adjudication of appeals on their merits, there is simply no support for Nutraceutical's argument that nonjurisdictional claim-processing rules are categorically immune to equitable exceptions.

This Court's treatment of claim-processing rules concerning appellate practice is consistent with the overarching goal that the Federal Rules be construed to favor an adjudication of claims on the merits. This Court has noted that the Rules generally should not be construed to require "summary dismissals," and instead should "not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *see also* Fed. R. Civ. P. 1 (providing that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). "The Federal Rules reject the approach that pleading is a game of skill in which one

misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (citation omitted); *see also Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (recognizing that the Federal Rules of Civil Procedure "are designed to discourage battles over mere form of statement" and that Rule 8(a)(2) "indicates that a basic objective of the rules is to avoid civil cases turning on technicalities") (citations omitted).

In seeking a rule to the contrary (Pet. 16-18), Nutraceutical misreads language from *Manrique v. United States*, 137 S. Ct. 1266 (2017) and *Eberhart*, in which this Court stated that claim-processing rules are "unalterable." *Manrique*, 137 S. Ct. at 1272; *Eberhart*, 546 U.S. at 15. This language, however, is taken from *Kontrick*, which specifically left open the possibility that claim-processing rules "could be softened on equitable grounds[,]" but did not reach the issue because the Court found a forfeiture of the right to enforce the rule. *Kontrick*, 540 U.S. at 456-57. Nor did *Manrique* or *Eberhart* have occasion to address the applicability of equitable exceptions. *Eberhart*, like *Kontrick*, found that the Government had forfeited the opportunity to enforce the claim-processing rule at issue, and the question of equitable exceptions therefore did not arise. *See Eberhart*, 546 U.S. at 19. And in *Manrique*, no argument was made that equitable exceptions could apply, and the Court's decision was therefore addressed only to the issues of whether: (i) the claim-processing rule at issue had been violated; and (ii) any violation could be overlooked merely because the Government was not harmed by the

violation. *Manrique* and *Eberhart* therefore offer no support for Nutraceutical's argument that nonjurisdictional claim-processing rules are immune to equitable exceptions.

In sum, the Federal Rules and this Court's precedents simply do not support Nutraceutical's proposed rule that nonjurisdictional claim-processing rules are categorically insusceptible to equitable exceptions.

B. Court-of-Appeals Case Law Further Shows that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

The courts of appeals additionally recognize that nonjurisdictional claim-processing rules can be subject to equitable exceptions. For instance, the Sixth Circuit recognized that Appellate Rule 15(d) is a claim-processing rule that "permits forfeiture and equitable exceptions to the deadline" and therefore granted a motion to intervene despite the untimeliness of the motion under the Rule. *Int'l Union of Operating Eng'rs, Local 18 v. NLRB*, 837 F.3d 593, 596 (6th Cir. 2016). Similarly, the Second Circuit: (i) recognized that Civil Rule 6(b)(2)—which states that certain deadlines are not extendable—is a nonjurisdictional claim-processing rule and is therefore subject to equitable exceptions; and (ii) remanded the case to the district court for a decision on whether waiver or an equitable exception applied to the facts presented there. *Legg v. Ulster Cty.*, 820 F.3d 67, 79-80 (2d Cir. 2016). The Seventh Circuit has likewise applied equitable tolling to Civil Rule 58(c)(2)(B). *Carter v. Hodge*, 726 F.3d 917, 919-20 (7th Cir. 2013); *see also Mobley*, 806 F.3d at

577-78 (finding that equitable considerations excused the untimely filing of a motion under Civil Rule 59(e)); *Khan*, 494 F.3d at 258-60 (2d Cir. 2007) (concluding that a court can recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); *U.S. v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 216 (3d Cir. 2000) (Alito, J., concurring) (noting that "both the Supreme Court and [the Third Circuit] have recognized an equitable exception to Rule 59"). In sum, the courts of appeals, like this Court, recognize that the Federal Rules can be subject to equitable exceptions.

C. The Availability of Equitable Exceptions Has Not Caused the Adverse Consequences that Nutraceutical Fears; However, the Rule Nutraceutical Advocates Will Lead to Circuit Courts Being Presented with 23(f) Petitions that Will Be Amended or Withdrawn as Moot

Nutraceutical alleges that subjecting nonjurisdictional claim-processing rules to equitable exceptions will cause a multitude of adverse consequences, such as "inject[ing] uncertainty into, and prolong[ing], district court proceedings." Pet. 23. Nutraceutical also worries that the availability of equitable exceptions will require courts to "scour the district court record" in order "to determine whether the [putative Rule 23(f) appellant] engaged in any conduct that would entitle him to equitable tolling." Pet. 22. Nutraceutical's concerns are misplaced.

First, Nutraceutical fails to recognize that a court of appeals has no obligation to accept an interlocutory appeal under Rule 23(f). Indeed, "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by [this Court] in acting on a petition for certiorari[,]" and "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. A putative appellant therefore will have no motivation to miss the Rule 23(f) deadline, because a late petition is very unlikely to be granted. Accordingly, it will be unusual for a party to miss the Rule 23(f) deadline, and even rarer for a party to invoke equitable exceptions.

Second, as Nutraceutical admits (Pet. 23), district courts generally need not stay their proceedings while a Rule 23(f) interlocutory appeal is pending. Fed. R. Civ. P. 23(f) ("An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."). Any "uncertainty" or "prolong[ed]" district-court proceedings (Pet. 23) therefore stem from a court's discretionary decision to stay proceedings during the appeal—not from the availability of equitable exceptions to a nonjurisdictional claim-processing rule.

Third, Nutraceutical's concerns about the "uncertainty" (Pet. 23) that equitable exceptions could inject into district-court proceedings are unfounded, as is evidenced by the availability of equitable tolling in the statute-of-limitations context. This Court has long held that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable

presumption' in *favor* 'of equitable tolling.'" *Holland v. Florida*, 560 U.S. 631, 645-46 (2010) (emphasis in original) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). Nutraceutical makes no suggestion that the availability of equitable tolling in this context has caused an undue burden on the federal courts, even though equitable tolling requires a fact-specific analysis. Similarly, there is no reason to suggest that subjecting the Federal Rules to equitable considerations should be unworkable. Indeed, for many years, this Court and the courts of appeals have recognized equitable exceptions to nonjurisdictional claim-processing rules. Nutraceutical points to no evidence of any adverse consequences that have arisen from the application of equitable exceptions in the cases where such exceptions are warranted.

In sum, Nutraceutical's argument for a categorical rule that nonjurisdictional claim-processing rules are insusceptible to equitable considerations has no support in this Court's precedents, in the Federal Rules, or in court-of-appeals case law. Nor has Nutraceutical pointed to any negative consequences that have flowed from the many cases that have applied equitable exceptions to nonjurisdictional requirements. The Ninth Circuit's unremarkable recognition that equitable considerations can apply to nonjurisdictional claim-processing rules therefore does not warrant this Court's review, especially in view of the multiple alternative bases for finding that Lambert's appeal was timely.

Rather than Lambert, it is Nutraceutical that seeks a rule that would waste party and judicial resources. It would have required Lambert, after the district court stated it would reconsider its order and provided a hearing date and briefing schedule for reconsideration, to nonetheless file a petition to appeal the order being reconsidered.

In this scenario, if Lambert had been successful with the motion for reconsideration, he would dismiss his petition, with the time he spent writing it, the time the other side spent opposing it, and the time the Motions Panel spent considering it, all a completely wasted effort. If the district court, as it actually did, modified its order but denied certification, Lambert would have had to file a second petition that explained why the new order was in error.

Either way, Nutraceutical's position, if adopted, calls for the motions panels of our circuit courts to regularly and needlessly consider 23(f) petitions involving orders that are later amended, expanded upon, vacated, modified, or withdrawn because of subsequent motions.

Here, there are only two relevant orders, but in other cases district courts deny certification without prejudice or deny certification pending additional evidence or briefing, often several times. Nutraceutical would have class action litigants on both sides, after receiving unfavorable but non-final decisions on certification, nonetheless barrage circuit courts with petition after petition in order to preserve their right to appeal the eventual final order granting or denying certification.

It is therefore little wonder that not even one of the twenty-three active judges on the Ninth Circuit even called for a vote on Nutraceutical's unsuccessful petition for rehearing *en banc*, much less actually voted for rehearing. CA Rec. 40.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORP.,

Petitioner,

v.

TROY LAMBERT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

In an attempt to avoid this Court's review, Respondent Troy Lambert understates the importance of the Ninth Circuit's erroneous decision – as well as the significant circuit split it created – and instead advances arguments regarding the timeliness of his petition under Federal Rule of Civil Procedure 23(f) that were already correctly rejected below.

Contrary to Lambert's arguments, the Question Presented presents issues far more important than the parties' instant dispute; in fact, *all* of the key factors this Court usually considers in deciding whether to grant certiorari are present. *See* Sup. Ct. R. 10(a), (c).

First, the decision below conflicts with at least seven other U.S. Circuit Courts of Appeal (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh). Those courts have all held that Rule 23(f) is strict and mandatory. None have applied equitable tolling and instead recognize only one narrow exception Lambert did not meet: a motion for reconsideration filed *before* Rule 23(f)'s 14-day deadline expires.

Lambert claims there is no circuit split because he filed a motion for reconsideration within Federal Rule of Civil Procedure 59(e)'s 28-day deadline while litigants in the other circuits' cases did not. But whether Lambert or the other litigants complied with Rule 59(e) is irrelevant here. Op. at 21–24. What matters is whether a motion for reconsideration was filed before the applicable *appeal* deadline in Rule 23(f) expired. *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within ten

days if it is going to toll the ten-day period[1] within which to seek permission to appeal."); *United States v. Healy*, 376 U.S. 75, 77–78 (1964) (A "timely petition for rehearing . . . filed within the permissible time for appeal" tolls the appeal deadline.). Because Lambert and the other litigants did not file motions for reconsideration before the applicable appeal deadline, their subsequently filed Rule 23(f) petitions were untimely.

Second, this case involves an important and frequently occurring issue of federal law that this Court has not had the opportunity to address. *Hamer v. Neighborhood Hous. Serv. of Chicago*, 138 S. Ct. 13, 18 n.3 (2017) ("We have reserved whether mandatory claim-processing rules may be subject to equitable exceptions."). The Ninth Circuit decided that exact issue, broadly holding that all claim-processing rules are subject to equitable exceptions. That ruling – now governing law in the busiest and largest circuit in the country – has profound consequences both in and outside the class action context.

Third, the decision below conflicts with this Court's precedent. This Court has held and reaffirmed that claim-processing rules are "unalterable" and "mandatory" where, as here, a party has properly raised them. *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017); *see also Eberhart v. United States*, 546 U.S. 12, 19 (2005).

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[1] Prior to December 1, 2009, Rule 23(f) provided for a filing period of ten days rather than fourteen.

Lambert argues that this Court's decisions in *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384 (1964), *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 372 U.S. 215 (1962), and other cases did apply equitable exceptions to appeal deadlines. However, these cases were overruled by *Bowles v. Russel*, 551 U.S. 205, 214 (2007). To the extent Lambert believes the cases still govern with respect to non-jurisdictional deadlines, he is equally mistaken. If that were true, this Court would not have made clear just last year that it has "reserved" that issue. *Hamer*, 138 S. Ct. at 18 n.3.

Attempting to dodge these issues, Lambert ignores the Ninth Circuit's reasoning and argues that the court did not need to apply equitable exceptions because he purportedly tolled Rule 23(f)'s 14-day deadline by filing a motion for reconsideration before Rule 59(e)'s 28-day deadline expired. Op. at 9. As noted above, however, Rule 23(f)'s shorter 14-day deadline is what governs – not Rule 59(e). Because Lambert's motion for reconsideration was filed more than 14 days after the District Court's order, it could not have tolled the 14-day appeal deadline in Rule 23(f). The Ninth Circuit correctly reached that conclusion below. *Lambert v. Nutraceutical*, 870 F.3d 1170, 1178 (9th Cir. 2017).

The Ninth Circuit also correctly rejected Lambert's erroneous arguments that (1) he made an oral motion at a March 2, 2015 status conference and (2) the District Court's order on his motion for reconsideration opened a new filing window under Rule 23(f). That is why the Ninth Circuit had to apply broad equitable

tolling in order to excuse the untimeliness of Lambert's Rule 23(f) petition.

Lambert also argues that Nutraceutical waived the Question Presented by not objecting in District Court to the timing of his motion for reconsideration. But Nutraceutical had no reason or obligation to object because it did not know that Lambert would file a subsequent Rule 23(f) petition. Lambert never disclosed his Rule 23(f) petition before it was filed, including at the March 2, 2015 status conference when he sought leave to file a motion for reconsideration. Appendix 68–77. Nutraceutical also did not waive its rights during Ninth Circuit oral argument as Lambert mistakenly claims.

In short, the Ninth Circuit's decision created a circuit split, presents an important question of federal law that this Court has not yet decided, violates Fed. R. App. P. 26(b), contravenes the very purpose behind Rule 23(f)'s short and mandatory deadline, and is inconsistent with this Court's precedent. The petition should be granted.

ARGUMENT

I. LAMBERT'S APPEAL WAS LATE

The Ninth Circuit applied equitable tolling because Lambert's Rule 23(f) petition was late. *Lambert*, 870 F.3d at 1176 ("[U]nless an exception applies, Lambert's Rule 23(f) petition would be barred."). Ignoring that holding, Lambert argues that his appeal was timely and there is "no need to consider any equitable exceptions." Op. at 7. He is mistaken.

A. Lambert Did Not Make an Oral Motion

Lambert claims he made an *oral* motion for reconsideration at a March 2, 2015 status conference. Op. at 8. The transcript shows otherwise. Lambert actually asked for "leave to file a renewed motion for class certification." Appendix at 71. The District Court rejected Lambert's request, but acknowledged his right to file a motion for reconsideration. Thereafter, Lambert filed a written motion. In short, neither the District Court, Lambert, or Nutraceutical thought that an oral motion had been made.

B. Rule 59(e) is Irrelevant

Lambert's second argument is that he filed a motion for reconsideration within Rule 59(e)'s 28-day deadline. Op. at 9. Even if that were true, it does not make his Rule 23(f) petition timely. The only way a motion for reconsideration can toll Rule 23(f)'s deadline is if it is filed before the 14-day deadline in Rule 23(f) expires. *McNamara*, 410 F.3d at 281; *Gary v. Sheahan*, 188 F.3d 891, 892 (7th Cir. 1999) ("[I]f the request for reconsideration is filed more than [14] days after the order . . . appeal must wait until the final judgment."); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) (same). That is why the Ninth Circuit had to apply equitable tolling. *Lambert*, 870 F.3d at 1178.

While Lambert cites this Court's opinions in *United States v. Ibarra*, 502 U.S. 1 (1991), *United States v. Dieter*, 429 U.S. 6 (1976), and *Healy*, 376 U.S. at 75, those decisions do not support his argument. Unlike Lambert, the appellants filed motions for reconsideration *before* the applicable appeal deadline expired. *Healy*, 376 U.S. at 77–78 (A "*timely* petition

for rehearing by the Government filed *within the permissible time for appeal* renders the judgment not final for purposes of appeal until the Court disposes of the petition." (emphasis added)); *see also Ibarra*, 502 U.S. at 5 (motion filed *before* 30-day appeal deadline in Fed. R. App. 4(b) had expired); *Dieter*, 429 U.S. at 7 (same).

This Court's precedent is therefore consistent with the rule that a motion for reconsideration must be filed before Rule 23(f)'s 14-day deadline expires in order to toll that deadline.

C. The District Court Did Not Restart the Rule 23(f) Deadline

Lambert's third argument is that the District Court's order on his motion for reconsideration reset Rule 23(f)'s deadline. Again, the Ninth Circuit did not adopt this argument. *Lambert*, 870 F.3d at 1181 n.8.

Nor is Lambert correct. "An order that leaves class-action status unchanged from what was determined by a prior order is not an order granting or denying class action certification," and thus does not trigger a new Rule 23(f) deadline. *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191–92 (10th Cir. 2006); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193 (3d Cir. 2008); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291–92 (11th Cir. 2007); *Nucor Corp.*, 760 F.3d at 343; *In re DC Water and Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009).

Because the District Court's order did not recertify the class and instead "maintain[ed] the status quo," the order did not restart the Rule 23(f) deadline.

II. THERE IS AN ACKNOWLEDGED SPLIT OF AUTHORITY

Lambert argues that "this case does not implicate any circuit conflict," Op. at 21, even though the Ninth Circuit expressly "recognize[d] that other circuits would likely not toll the Rule 23(f) deadline in Lambert's case." *Lambert*, 870 F.3d at 1179.

In fact, every other U.S. Circuit Court of Appeal to consider this issue – the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh – has held that the Rule 23(f) deadline is "strict and mandatory" because its purpose is to reduce the inherent disruption caused by interlocutory appeals. *See Gutierrez*, 523 F.3d at 192 (collecting cases). None of the other circuits have applied equitable tolling or otherwise excused a party's failure to file a Rule 23(f) petition or motion for reconsideration within the 14-day deadline.

Moreover, the Third, Tenth, and Eleventh Circuits have rejected untimely Rule 23(f) petitions in situations that closely resemble the facts before the Ninth Circuit. *See id.* at 190–91, 198 (Rule 23(f) "is clearly a strict and inflexible time limit" that cannot excuse a petitioner's mistaken reliance on a district court's scheduling order.); *see also Jenkins*, 491 F.3d at 1289–92 (rejecting untimely Rule 23(f) petition even though, in light of petitioners' excusable neglect, the district court vacated its order to restart Rule 23(f)'s deadline); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004).

Lambert believes his case is distinguishable because he filed a motion for reconsideration within the 28-day deadline in Rule 59(e), however, as explained above,

whether Lambert complied with Rule 59(e) is irrelevant. Rather, what matters is whether the motion for reconsideration was filed before the shorter 14-day deadline in Rule 23(f) expired. For that reason, the other circuits would have rejected the Rule 23(f) petitions at issue *even if* the petitioners had complied with Rule 59(e).

III. THE DECISION BELOW VIOLATES FED. R. APP. P. 26

As explained in the petition, the Ninth Circuit violated Fed. R. App. P. 26(b)(1)'s express prohibition against "extend[ing] the time to file . . . a petition for permission to appeal." *See Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (rejecting untimely Rule 23(f) petition; holding "this Court is expressly barred from extending the time to file a petition for permission to appeal"); *Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013) (same); *Delta Airlines*, 383 F.3d at 1145.

In response, Lambert argues that "the district court simply gave Lambert a six-day extension of time" to file a motion for reconsideration and "[n]othing in the Federal Rules prohibits a court from extending the time to file a motion for reconsideration." Op. at 14. Again, Lambert misses the point. Even assuming courts can extend the time to file a motion for reconsideration, such an extension does not affect the *separate* deadline governing Rule 23(f) petitions. *Gutierrez*, 523 F.3d at 194 n.6 ("[W]hile the District Court has the power to control its docket and was well within its authority to extend the time for Petitioners to file their Motion to Reconsider, it did not have the

authority to extend the time to file a Rule 23(f) petition.").

IV. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S PRECEDENT

Lambert cites *Thompson*, 375 U.S. at 387, *Harris Truck Lines*, 371 U.S. at 217, and other cases where this Court has applied equitable tolling. Op. at 25–26. Lambert admits that these cases were overruled by *Bowles*, 551 U.S. at 214, yet he argues they are good law with respect to non-jurisdictional deadlines. *Id.*

Lambert ignores this Court's more recent decisions. As those cases made clear, this Court has "reserved whether mandatory claim-processing rules may be subject to equitable exceptions." *Hamer*, 138 S. Ct. at 18 n.3; *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004).

Moreover, this Court's decisions in *Eberhart* and *Manrique* suggest that equitable tolling cannot apply to all claim-processing rules. *Eberhart* held that claim-processing rules are "unalterable on a party's application." *Eberhart*, 546 U.S. at 15 (citations omitted). The Court reaffirmed that rule in *Manrique* when it held that a court's "duty to dismiss" an untimely appeal of an amended judgment was "mandatory" if the opposing party objected. *Manrique*, 137 S. Ct. at 1271–72.

Lambert's attempt to distinguish these cases is unconvincing. He argues that neither "*Manrique* or *Eberhart* ha[d] occasion to address the applicability of equitable exceptions." Op. at 30. Yet, *Eberhart* did just that when addressing *United States v. Robinson*, 361 U.S. 220 (1960). In *Robinson*, this Court reversed

the Seventh Circuit's ruling that an "excusable neglect" exception applied to untimely notices of appeal. *Eberhart*, 546 U.S. at 17. As *Eberhart* explained, "*Robinson* is correct not because the District Court lacked subject-matter jurisdiction, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Id.* (emphasis added).

Lambert also argues that this Court has a "longstanding recognition that cases should not turn on technicalities in the notice-of-appeal context." Op. at 28. But this case does not involve technical pleading violations like the cases Lambert cites. This case involves a party's failure to comply with a strict deadline designed to reduce the disruption caused by interlocutory appeals. Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment).

While Lambert argues that cases should be decided on the merits, there also exists a strong public policy, as reflected in Rule 23(f) itself, against time-consuming and expensive interlocutory appeals. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) ("[T]he drafters intended interlocutory appeal to be the exception rather than the rule.").[2]

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[2] Lambert also argues that reversal of the Ninth Circuit will not affect this case because the District Court will recertify the class. Op. at 20. As noted above, this case presents more important issues than the parties' dispute. In any event, Lambert's argument is pure speculation. Certification is inappropriate for numerous reasons the District Court has not yet addressed.

V. NUTRACEUTICAL DID NOT WAIVE OR FORFEIT THE QUESTION PRESENTED

Lambert argues that Nutraceutical did not object to the timeliness of his motion for reconsideration in its opposition or when the District Court set a briefing schedule at the March 2, 2015 status conference. At that time, however, Nutraceutical *did not even know* that Lambert intended to file a Rule 23(f) petition. Lambert never mentioned his Rule 23(f) petition during the status conference or any other time before it was filed. Appendix 68–77. Without knowing that Lambert would file a Rule 23(f) petition, Nutraceutical could not possibly have waived any objection. *Hamer*, 138 S. Ct. at 17 n.1 ("[W]aiver is the intentional relinquishment or abandonment of a known right." (citations omitted).)

Lambert's theory that Nutraceutical waived its rights during Ninth Circuit oral argument also fails. As this Court has stated, "we are loath to attach conclusive weight to the relatively spontaneous responses of counsel to equally spontaneous questioning from the Court during oral argument." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972); *see also Robb v. Bethel Sch. Dist. 403*, 308 F.3d 1047, 1054 (9th Cir. 2002) ("We are not inclined to infer a waiver from oral argument lightly."), *overruled on other grounds by* 653 F.3d 863 (9th Cir. 2011). Here, Nutraceutical's counsel merely responded to a hypothetical question from the bench and was interrupted by another judge before he could explain that this is an unsettled issue of law. Oral Argument at 23:40–24:30, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15–56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181. That brief and

incomplete exchange is hardly the sort of deliberate, clear, and unambiguous statement required to show an intentional waiver of the Question Presented. *See MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 340 (6th Cir. 1997) ("In order to qualify as judicial admissions, an attorney's statements must be deliberate, clear and unambiguous.").

In addition, as Lambert acknowledges, Nutraceutical's response referenced the unique circumstances doctrine – a doctrine that is not even at issue here, as it only applies if a court, unlike here, makes a "specific assurance" that an appeal can be initiated at a later date. 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1168 (4th ed.); Appendix 68–77. Moreover, the Ninth Circuit did not apply the unique circumstances doctrine here, instead issuing a far broader holding that all claim-processing rules are subject to equitable tolling. *Lambert*, 870 F.3d at 1177 n.2.

CONCLUSION

In sum, this case presents all of the key factors this Court usually considers in deciding whether to grant certiorari: a recognized circuit split; an important issue of federal law this Court has not had the opportunity to address; and a decision inconsistent with this Court's precedent (and the federal rules it promulgates). Sup. Ct. R. 10(a), (c). This case is therefore the appropriate vehicle for this Court to address the Question Presented.

Respectfully submitted,

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No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORP.,

Petitioner,

v.

TROY LAMBERT,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Troy Lambert's Corrected Rule 23(f) Petition to Appeal Orders Decertifying Class and Denying Reconsideration of Same (July 8, 2015) ... JA 17

Defendant-Respondent's Opposition to Petition for Permission to Appeal Under Fed. R. Civ. P. 23(f) (July 20, 2015) ..... JA 39

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Petition for Rehearing En Banc (September 29, 2017) ..... JA 148

The following parts of the record have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

United States Court of Appeals for the Ninth Circuit, Opinion, September 15, 2017 ..... App. 1

United States District Court for the Central District of California, Order, June 24, 2015 ..... App. 27

United States District Court for the Central District of California, Order, February 20, 2015 . App. 52

United States Court of Appeals for the Ninth Circuit, Order Denying Petition for Rehearing, November 3, 2017 ..... App. 67

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RELEVANT DOCKET ENTRIES

United States District Court for the Central District of California (Western Division – Los Angeles) 2:13-cv-05942-AB-E

Frank Ortega, et al. v. Natural Balance, Inc., et al.

Date Filed	#	Docket Text
08/14/2013	1	CLASS ACTION COMPLAINT against Defendants Natural Balance Inc, Nutraceutical International Corporation. Case assigned to Judge Audrey B. Collins for all further proceedings. Discovery referred to Magistrate Judge Charles F. Eick. (Filing fee $400 PAID.) Jury Demanded., filed by Plaintiffs Frank Ortega, Troy Lambert. (et) (mg). (Entered: 08/16/2013)
		* * *
06/19/2014	80	ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION by Judge Audrey B. Collins granting 65 Motion to Certify Class Action: For the foregoing reasons, the Court GRANTS Plaintiffs' Motion for Class

		Certification. However, the Class Definition must be revised to exclude claims not within the ordinary statute of limitations. The Court also approves Plaintiffs' plan for giving notice, except that the Court DENIES Plaintiffs request for an order requiring Defendant to pay for notice and to include notice in the product's packaging. Within seven (7) days of the issuance of this Order, Plaintiffs are to submit a revised Proposed Order reflecting these changes. (see document for further details) (bm) (Entered: 06/19/2014)
		* * *
08/12/2014	86	ORDER OF THE CHIEF JUDGE (#14-035) approved by Chief Judge George H. King. Pursuant to the recommended procedure adopted by the Court for the CREATION OF CALENDAR of Judge Andre Birotte Jr., this case is transferred from Judge Audrey B. Collins to the calendar of Judge Andre Birotte, Jr for all further proceedings. The case number will now reflect the initials of the transferee Judge

		CV 13-05942 AB (Ex). (mg) (Entered: 08/12/2014)
		* * *
11/17/2014	111	NOTICE OF MOTION AND MOTION to Certify Class MOTION FOR CLASS DECERTIFICATION filed by defendant Nutraceutical Corp.. Motion set for hearing on 12/22/2014 at 10:00 AM before Judge Andre Birotte Jr. (Attachments: # 1 Garvin Decl iso Motion to Decertify Class, # 2 Greene Decl iso Motion to Decertify Class, # 3 Greene Decl Ex A, # 4 Greene Decl Ex B, # 5 Greene Decl Ex C, # 6 Greene Decl Ex D, # 7 Greene Decl Ex E, # 8 Greene Decl Ex F)(Greene, Andra) (Entered: 11/17/2014)
		* * *
12/01/2014	141	MEMORANDUM in Opposition to MOTION to Certify Class MOTION FOR CLASS DECERTIFICATION 112 , MOTION to Certify Class MOTION FOR CLASS DECERTIFICATION 111 filed by Plaintiff Troy Lambert. (Attachments: # 1 Declaration of Ronald A. Marron)(Marron, Ronald) (Entered: 12/01/2014)

	* * *	
12/22/2014	147	MINUTES OF MOTION FOR CLASS DECERTIFICATION 111 taking under advisement 111 Motion to Certify Class Action Hearing held before Judge Andre Birotte, Jr: The Court having carefully considered the papers and the evidence submitted by the parties, and having heard the oral argument of counsel, hereby takes the motion under submission. Court Reporter: Chia Mei Jui. (bm) (Entered: 12/22/2014)
	* * *	
02/20/2015	175	ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION by Judge Andre Birotte, Jr.: Defendant Nutraceutical Corporation's Motion for Class Decertification 111 is GRANTED. (gk) (Entered: 02/20/2015)
	* * *	

03/02/2015	178	AMENDED MINUTES Of Status Conference 177 held before Judge Andre Birotte, Jr.: Court and counsel discuss dates and deadlines. Plaintiff's counsel informs the Court of Plaintiff's intention to file a Motion for Re-Consideration. For the reasons stated on the record, the Court defers the setting of pretrial and trial dates and vacates the hearing re Motions for Summary Judgment 125 and Motion to Exclude Expert Report and Testimony 128 until after ruling on the Motion for Re-Consideration. The Motion shall be filed on or before 3/12/2015. Court Reporter: Chia Mei Jui. (gk) (Entered: 03/03/2015)
	* * *	
03/12/2015	183	NOTICE OF MOTION AND MOTION for Reconsideration re Order on Motion to Certify Class Action, Order on Motion for Order 175 filed by Plaintiff Troy Lambert. (Attachments: # 1 Declaration of Paul K. Joseph and Exs. A-B thereto, # 2 Proposed Order Granting Plaintiff's Motion for Reconsideration of the Court's

		Order Granting Defendant's Motion for Decertification, # 3 Certificate of Service)(Weston, Gregory) (Entered: 03/12/2015)
		* * *
03/30/2015	189	MEMORANDUM in Opposition to MOTION for Reconsideration re Order on Motion to Certify Class Action, Order on Motion for Order 175 183 filed by Defendant Nutraceutical Corp.. (Attachments: # 1 Declaration of Steven N. Feldman, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Declaration of Jeffrey A. Hinrichs)(Hueston, John) (Entered: 03/30/2015)
		* * *
04/13/2015	192	RESPONSE IN SUPPORT of MOTION for Reconsideration re Order on Motion to Certify Class Action, Order on Motion for Order 175 183 filed by Plaintiff Troy Lambert. (Attachments: # 1 Declaration of Paul K. Joseph and Ex.1 thereto)(Weston, Gregory) (Entered: 04/13/2015)
		* * *

04/23/2015	194	(IN CHAMBERS) ORDER TAKING PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION (DKT. 183) UNDER SUBMISSION by Judge Andre Birotte Jr.: The Court has considered the matters raised with respect to the Motion(s) and has concluded that pursuant to Local Rule 7.15, the matter can be decided without oral argument. The Court advises counsel that the Motion(s), noticed for hearing on April 27,2015 has been taken under submission and off its motion calendar. No appearance by counsel is necessary. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (cb) TEXT ONLY ENTRY (Entered: 04/23/2015)

06/24/2015	195	ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING DEFENDANT'S MOTION FOR CLASS DECERTIFICATION by Judge Andre Birotte, Jr.: The Court DENIES Plaintiff's Motion for Reconsideration 183 . The Court ORDERS Plaintiff to file a proposed notice with respect to class decertification no later than 21 days following the issuance of this Order. Plaintiff will bear the cost of class notice. Culver, 277 F.3d at 915. This case shall move forward with Summary Judgement and Trial. Because the Court previously vacated all dates 178 , a status conference is scheduled for 7/27/2015 at 10:00 AM to reset dates and discuss the possibility of supplemental Summary Judgment briefing considering this ruling. (gk) (Entered: 06/24/2015)
* * *		
07/30/2015	203	NOTICE Plaintiff's Notice of Filing 23(f) Motion for Permission to Appeal filed by Plaintiff Troy Lambert. (Weston, Gregory) (Entered: 07/30/2015)

	* * *	
08/03/2015	205	ORDER RE STAY OF ACTION AND ORDER REMOVING CASE FROM ACTIVE CASELOAD BY VIRTUE OF STAY by Judge Andre Birotte, Jr.: The Court, having received Plaintiff Troy Lambert's Notice of Filing a Federal Rule of Civil Procedure Rule 23(f) Petition for an Appeal 203 , IT IS HEREBY ORDERED that this action shall be STAYED until the Ninth Circuit rules on Plaintiff's Rule 23(f) Petition. IS HEREBY ORDERED that this action is removed from the Court's active caseload until further application by the parties or Order of this Court. In order to permit the Court to monitor this action, the Court orders the parties to file periodic status reports. The first such report is to be filed on 9/14/2015, unless the stay is lifted sooner. Successive reports shall be filed every 45 days thereafter. Each report must indicate on the face page the date on which the next report is due. All pending calendar dates are vacated by the Court. This Court retains

		jurisdiction over this action and this Order shall not prejudice any party to this action. (Made JS-6. Case Terminated.) (gk) (Entered: 08/03/2015)
	* * *	
09/21/2015	210	NOTICE OF APPEAL to the 9th CCA filed by Plaintiff Troy Lambert. Appeal of Order on Motion for Reconsideration,,, 195 (Appeal fee of $505 receipt number 0973-16481006 paid.) (Marron, Ronald) Modified on 9/21/2015 (mat). (Entered: 09/21/2015)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

15-80119

Troy Lambert v. Nutraceutical Corp.

07/08/2015	1	FILED ON 07/08/2015 PETITION FOR PERMISSION TO APPEAL PURSUANT TO RULE 23(f). SERVED ON 07/08/2015. [9604125] (OC) [Entered: 07/09/2015 11:02 AM]

* * *

07/20/2015	7	Filed (ECF) Respondent Nutraceutical Corp. answer to 23f petition. Date of service: 07/20/2015. [9616280] [15-80119] (Feldman, Steven) [Entered: 07/20/2015 04:38 PM]
09/16/2015	8	Filed order (STEPHEN R. REINHARDT and JOHNNIE B. RAWLINSON): The court, in its discretion, grants the petition for permission to appeal the district court's February 20, 2015 order granting the motion for class decertification and the June 24, 2015 order denying the motion for reconsideration of the February 20, 2015 order. See Fed. R. Civ. P. 23(f); Chamberlan v. Ford Motor Co., 402 F.3d 952 (9th Cir. 2005) (per curiam). Within 14 days after the date of this

order, petitioner shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d). In addition to all other issues the parties wish to raise in their briefs in the appeal, the parties shall address the timeliness of this petition No. 15-80119. Cf. Briggs v. Merck Sharp & Dohme, Nos. 15-55873, 15-55874, 15-55875, 15-55876, 15-55877, 2015 WL 4645605 *5-6 (9th Cir. August 6, 2015) (after the petitions for permission to appeal were granted, the merits panel considered the timeliness of the petitions). [9685721] (AF) [Entered: 09/16/2015 04:04 PM]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

15-56423

Troy Lambert v. Nutraceutical Corp.

09/17/2015	2	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Fee due from Appellant Troy Lambert on 09/16/2015. Mediation Questionnaire due on 09/24/2015. Transcript ordered by 10/16/2015. Transcript due 11/16/2015. Appellant Troy Lambert opening brief due 12/28/2015. Appellee Nutraceutical Corp. answering brief due 01/28/2016. Appellant's optional reply brief is due 14 days after service of the answering brief. [9687481] (RT) [Entered: 09/17/2015 04:25 PM]
		* * *
01/27/2016	8	Submitted (ECF) Opening Brief for review. Submitted by Appellant Troy Lambert. Date of service: 01/27/2016. [9843013] [15-56423] (Weston, Gregory) [Entered: 01/27/2016 02:03 PM]

01/27/2016	9	Submitted (ECF) excerpts of record. Submitted by Appellant Troy Lambert. Date of service: 01/27/2016. [9843020] [15-56423] (Weston, Gregory) [Entered: 01/27/2016 02:05 PM]

* * *

02/25/2016	15	Submitted (ECF) Answering Brief for review. Submitted by Appellee Nutraceutical Corp.. Date of service: 02/25/2016. [9879094] [15-56423] (Hueston, John) [Entered: 02/25/2016 03:09 PM]
02/25/2016	16	Submitted (ECF) supplemental excerpts of record. Submitted by Appellee Nutraceutical Corp.. Date of service: 02/25/2016. [9879102] [15-56423] (Hueston, John) [Entered: 02/25/2016 03:10 PM]

* * *

03/01/2016	21	Filed Appellee Nutraceutical Corp. paper copies of supplemental excerpts of record [16] in 1 volume. [9886032] (SML) [Entered: 03/02/2016 10:23 AM]
04/08/2016	22	Submitted (ECF) Reply Brief for review. Submitted by Appellant Troy Lambert. Date of service: 04/08/2016. [9933782] [15-56423] (Weston, Gregory) [Entered: 04/08/2016 05:20 PM]

* * *

03/09/2017	33	ARGUED AND SUBMITTED TO RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN. [10350860] (DJW) [Entered: 03/09/2017 04:13 PM]

* * *

09/15/2017	37	FILED OPINION (RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN) REVERSED AND REMANDED. Judge: RAP Authoring. FILED AND ENTERED JUDGMENT. [10582263] (MM) [Entered: 09/15/2017 08:31 AM]

* * *

11/03/2017	40	Filed order (RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN): The panel has voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED. [10642477] (AF) [Entered: 11/03/2017 09:33 AM]

11/07/2017	41	Filed (ECF) Appellee Nutraceutical Corp. Motion to stay the mandate. Date of service: 11/07/2017. [10645863] [15-56423] (Hueston, John) [Entered: 11/07/2017 10:37 AM]
11/07/2017	42	Filed order (RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN): Appellee's motion to stay the issuance of the mandate pending the filing and disposition of a petition for certiorari is GRANTED. [10646260] (AF) [Entered: 11/07/2017 12:45 PM]

No. 15- ____ — Filed July 8, 2015

***In the* United States Court of Appeals**
***for the* Ninth Circuit**

TROY LAMBERT,
on behalf of himself and all others similarly situated,
Plaintiff-Petitioner
v.
NUTRACEUTICAL CORPORATION,
Defendant-Respondent.

Appeal from an Order of the United States District Court for the Central District of California, Case No. 2:13-cv-5942-AB-(Ex)

TROY LAMBERT'S CORRECTED RULE 23(F) PETITION TO APPEAL ORDERS DECERTIFYING CLASS AND DENYING RECONSIDERATION OF SAME

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Plaintiff-Petitioner Troy Lambert respectfully requests permission to appeal the order of the United States District Court, Central District of California, granting Defendant-Respondent Nutraceutical Corporation's motion to decertify the previously certified class and denying his motion to reconsider that order.

INTRODUCTION

Defendant packages and sells "Cobra Sexual Energy," an ineffective and dangerous "aphrodisiac" herbal witches' brew. This precise conduct is prohibited by the FDA's Aphrodisiac Drug Rule, 21 C.F.R. § 310.528.

On June 19, 2014, the Honorable Audrey B. Collins certified the class finding that common issues predominated because "[a]ll of the Plaintiffs' claims depend on the common issue of whether Cobra's labeling is false or misleading." Doc. 80 at 10:15-17. Following her appointment to Associate Justice of the California Court of Appeal and reassignment, Defendant moved to decertify the class. On February 20, 2015, the motion was granted, solely on the basis that, ". . . although Plaintiff's full refund model is consistent with his theories of liability," Doc. 175 at 4, ":. . . . because Plaintiff failed to provide the key evidence necessary to apply his classwide model for damages, the Court cannot find that common issues predominate under Rule 23(b)(3)." Doc. 175 at 11.

This was manifest error for at least three reasons. First, this Court has instructed the lower courts

repeatedly that "damages is invariably an individual question [that] does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (citations omitted); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010).

Second, far from lacking evidence, Plaintiff already has obtained sufficient price information under their proposed model to allow a factfinder to calculate a restitutionary award under California law. Indeed, Plaintiff provided evidence for two separate damage models, a wholesale price model directly from Defendant's records, and a retail price model supported by multiple sources of evidence, including the price Defendant sold Cobra for online, and its suggested retail price.

Third, even if the District Court had correctly supposed that a gap existed in the evidence necessary to calculate damages *at this time*, that evidence supporting an approved model can easily be supplemented through additional pre-trial investigation or through cooperating or adverse-witness testimony adduced at trial. The Court should therefore approve Lambert's Petition for Review and vacate the orders decertifying the Class.

STATEMENT OF JURISDICTION

Defendant is a Delaware corporation that owns stores and conducts business in California. *See* Doc. 56, SAC ¶¶ 8, 12. The district court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). This Court has jurisdiction to review the order denying class certification under Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292(e). The Petition is timely because it was

filed on July 8, 2015, within 14 days after the order denying Plaintiff's motion for reconsideration was entered on June 24, 2015. Doc. 195. *See* Fed. R. Civ. P. 6(a)(1) & 23(f).[1]

QUESTIONS PRESENTED

1. Where the District Court found that the Plaintiff's damages model matches his theories of liability, but hypothesized that the retail price data Plaintiff had obtained up until that time might be insufficient to calculate precise class-wide damages, and where the court incorrectly assumed that Plaintiff could not obtain any additional price information through investigation or at trial, and further refused to consider a fully-briefed and supported alternative model in the summary judgment motion, was the court's order decertifying a false-advertising consumer class action a sound exercise of the court's discretion?

2. Was the District Court's order refusing to recertify the class, and thus sounding the death knell of a class action where Plaintiff's individual claim is

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[1] This Circuit has not addressed if orders denying reconsideration of decertification orders are subject to 23(f) petitions, though the rule's language of "an order granting or denying class certification" certainly applies here, because Plaintiff's motion for reconsideration sought certification, and the Court's order is thus an "order [] denying class certification. *See also Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193 (3d Cir. 2008) ("join[ing] the other circuits in holding" Rule 23(f) petitions are timely where a party files a "timely and proper motion to reconsider the grant or denial of class certification.") Here, Plaintiff, following decertification, promptly sought leave to file a motion for reconsideration, which the Court granted and set a schedule for at its post-decertification scheduling conference. Doc. 177.

under $200, questionable and appropriate for Rule 23(f) review?

STATEMENT OF FACTS

This action seeks relief under California state law for Defendant's deceptive marketing and sale of a product called "Cobra Sexual Energy." (hereinafter "Cobra" or the "Product"). *See* SAC ¶¶ 1; 5-6, 8. Defendant manufactures, advertises, and sells Cobra claiming among other things that it will allow users to "Take Virility to the Max!" and contains "aphrodisiac plants to enhance . . . sexual energy." SAC ¶¶ 44-89. Defendant also makes efficacy claims about the Product's ingredients, including yohimbe, "Horny Goat Weed" and muira puama, which it calls "Potency Wood." *See id.*; *see also* ¶¶ 64-89; These aphrodisiac claims are false. *See* SAC ¶¶ 26-30; 55-57; 90-94. Thus, Cobra is an unapproved and illegal new drug product. One of the ingredients, yohimbe, is also dangerous, and its use has caused acute cardiac arrest and multiple deaths. *Id.* ¶¶ 31-43. The National Institutes of Health warns that yohimbe "may interfere with insulin and other medications used for diabetes," SAC ¶ 33, 67-68, may "bring out manic-like symptoms in people with bipolar disorder, or suicidal tendencies in individuals with depression," SAC ¶ 32, and may cause stroke, arrhythmia, hypertensive crisis, cardiac arrest, and death if ingested with many foods, such as cured meats and aged cheeses, that contain tyramine. SAC ¶¶ 34, 36-37. Defendant failed to warn consumers about any of these serious health risks. SAC ¶ 31.

Defendant did not apply for or obtain an FDA new drug approval for Cobra before it began marketing and selling it to the public as an "aphrodisiac." SAC ¶ 93.

Though Defendant's conduct is clearly illegal under general FDA new drug regulations, so great is the problem of companies like Defendant selling fake "herbal aphrodisiacs" that the FDA promulgated a specific regulation prohibiting such conduct.[2] Consumers are unaware that "Cobra Sexual Energy" is illegal to sell as advertised, that Defendant's marketing of the Product is prohibited by the FDA, and that the Product is dangerous to consume.[3] Plaintiff purchased Cobra based on its false and misleading labeling, and would not have purchased Cobra absent these claims and advertisements, or if he had known the product was illegally marketed and sold. SAC ¶¶ 25, 100.

REASONS FOR GRANTING THE PETITION

Interlocutory review under Rule 23(f) allows the Court to "restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 958-59 (9th Cir. 2005). Interlocutory review of a certification decision is most appropriate when:

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[2] The Aphrodisiac Drug Rule, 21 C.F.R. § 310.528(a), states "[a]ny product that bears labeling claim[ing] that it will arouse or increase sexual desire, or that it will improve sexual performance, is an aphrodisiac drug product" i.e., an illegal unapproved new drug. "Labeling claims for aphrodisiacs for OTC use are either false, misleading, or unsupported by scientific data[.]" *Id.*

[3] The FDCA requires every new drug to have its application and label approved by the United States Food and Drug Administration ("FDA") before the drug can be marketed or sold to the public. *See generally* 21 U.S.C. §§ 355(a)-(b).

> (1) there is a death-knell situation . . . that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important to both the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id. at 959.

Chamberlan holds an appeal under Rule 23(f) is appropriate when a plaintiff denied certification could only appeal after judgment on the merits of an individual claim that is worth less than the cost of litigation. Denial of certification in such a case "sounds the death knell of the litigation." *Id.* Here, all three of the *Chamberlan* factors are present: manifest error, fundamental issue of law, and a "death-knell" situation.

I. THE DISTRICT COURT COMMITTED MANIFEST ERRORS OF BOTH LAW AND FACT.

A decision to certify or de-certify a class action is at the District Court's sound discretion, as long as that decision follows sound legal principles and is not based on clearly erroneous or irrelevant findings of fact. *Leyva v. Medline Indus.*, 716 F.3d 510, 513 (9th Cir. 2013). The District Court, however, both failed to follow Ninth Circuit authority and made dispositive factual findings that were without support in the record, thereby abusing its discretion.

A. Nothing in the Order Calls Into Question the District Court's Correct Prior Holding That Plaintiff Demonstrated Predominance.

The District Court, before reassignment, ruled correctly that the proposed Class satisfies predominance. Doc. 80 at 9-14. In the decertification order, however new, legally-improper predominance criteria were introduced based on supposed gaps in Plaintiff's data regarding retail sales prices.

1. Common Questions Predominate.

"The Rule 23(b)(3) predominance inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (citing *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2249 (1997)). If "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then those issues predominate over individual questions. *Id.*

The District Court previously found that "[a]ll of the Plaintiffs' claims depend on the common issue of whether Cobra's labeling is false or misleading[,]" and that "[t]he evidence relevant to this inquiry is also common to all claims: it is the packaging itself." Doc. 80 at 10. Neither of these factors has changed and the court makes no finding that they have. The court's previous holding that "Defendant's arguments that individual questions predominate are unavailing," *id.* at 11, still holds true. The class, as before, satisfies the Ninth Circuit's criteria for predominance.

2. The Order Contradicts Ninth Circuit Authority Regarding Damages and Predominance.

Uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages. *Leyva*, 716 F.3d at 514, applying *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1435 (2013). In *Leyva*, a wage-and-hour class action, this Court held that the predominance requirement is satisfied if the plaintiff is "able to show that [class] damages stemmed from the defendant's actions that created the legal liability." 716 F.3d at 513.[4]

The District Court here, however, de-certified the Class on the sole basis that there was as yet, according to the court, incomplete evidence in the record regarding retail prices paid by class members. Doc. 175 at 7-11. This both gets the record wrong and is wholly inconsistent with Ninth Circuit authority that uncertainty in damages calculations does not call into question predominance for class certification purposes. *See Leyva*, 716 F.3d at 514.

At the class certification stage, a plaintiff only needs to show that the proposed method for calculating damages is plausible. *See, e.g., Menagerie Prods. v. Citysearch*, 2009 U.S. Dist. LEXIS 108768, *62 (C.D.

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[4] The District Court attempted to distinguish *Leyva* on the basis that the plaintiffs in that action "had a workable damages model that matched their theory of liability." Doc. 175 at 10:22-24. But that is exactly what the District Court also found in *this* action - that the Plaintiff had provided an appropriate damages model that matched the theory of liability. Doc. 175 at 7:4-5.

Cal. Nov. 9, 2009) (certifying the class over defendants' objection that the method of calculating damages was imprecise.) The District Court's observation that Plaintiff's retail price data was not complete was therefore insufficient justification to decertify the class. *See Johns v. Bayer Corp.*, 280 F.R.D. 551, 557 (S.D. Cal. 2012) (applying *Yokoyama* to certify a similar class challenging vitamin advertising). In the instant case, as in *Leyva*, "the district court applied the wrong legal standard by concluding that individual questions predominate over common questions." *Leyva*, 716 F.3d at 513.

Courts have correctly applied the guidance in *Leyva* in the consumer goods context, specifically in false advertising cases. *See, e.g. In re ConAgra Foods, Inc.*, 2015 U.S. Dist. LEXIS 24971 (C.D. Cal. Feb. 23, 2015). In *ConAgra* the court certified the class even though defendants asserted that plaintiffs were "unable to determine the price [premiums] they paid for [products advertised as 100% Natural] and have no means of acquiring this information. . . ." 2015 U.S. Dist. LEXIS 24971 at *85. The court in *ConAgra* found defendant's arguments "unconvincing" and certified the class over its objections that plaintiffs could not ascertain retail purchase prices or calculate damages precisely. *Id.* at *92 (citing *Forcellatti v. Highland's, Inc.*, 2014 U.S. Dist. LEXIS 50600, at *5 (C.D. Cal. Apr. 9, 2014); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *McCrary v. Elations Co., LLC*, 2014 U.S. Dist. LEXIS 8443, *8 (C.D. Cal. Jan. 13, 2014)). *See also Spann v. J.C. Penney Corp.*, 2015 U.S. Dist. LEXIS 73541, *63 (C.D. Cal. May 18, 2015) (finding that common issues predominated even in the presence of significant uncertainties as to damages.)

None of the cases the District Court cited in support provide binding or persuasive authority for decertifying the class. The court cites, for example, to *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 135-36 (S.D.N.Y. 2006); Doc. 175 at 11. *Freeland* was an antitrust action unsuitable for class treatment because, *inter alia*, the class representative did not have standing, the plaintiff had no method of determining which class members suffered injury, and, likely influential in the court's decision, the *Freeland* court anticipated it would have to hold approximately 100 million individual hearings before it could rule on injunctive relief. *Freeland*, 238 F.R.D. at 143 n.6

Caldera v. J.M. Smucker Co., 2014 U.S. Dist. LEXIS 53912 (C.D. Cal. Apr. 15, 2014) is also easily distinguishable because the plaintiff's damages model in that false labeling snack food case required a "true market value" of the product – not required here – so the defendant's sales data alone were not sufficient. *Id.* at *11, 12. Even if Smucker's health claims were overstated, the *Caldera* court found the products still had *some* value, and a premium between the mislabeled product and the value received needed to be calculated, which the plaintiff in *Caldera* failed to do.

Plaintiff here, by contrast, alleges and provides evidence that (1) the product is wholly ineffective (2) the product is dangerous (3) the product is illegal. For these reasons, no "true value" calculation is needed: the entire amount was fraudulently obtained with no off-setting value, unlike a food product with overstated health claims that can still be consumed and enjoyed. *Caldera* is therefore inapplicable. *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *12-

13 (N.D. Cal. Jan. 7, 2014), also cited by the court, is similar. Doc 175 at 8. The damages calculation in *Astiana* hinged on comparing the products at issue with competing ice cream in the same markets, for which the plaintiffs had provided no data whatsoever. Because the full-refund damages calculation here does not depend on comparison with any other products, *Astiana* is also inapposite.

In *Marlo v. U.P.S.*, similarly, the court was primarily concerned "about the class-wide applicability of the evidence regarding employee misclassification." 639 F.3d 942, 945-47 (9th Cir. 2011). Plaintiff here has already obtained sufficient price information to enable the jury to estimate damages, *see* Section I. C, below. But even if the damages calculation is uncertain, Ninth Circuit authority as applied to consumer products flatly prohibits the decertification decision on such basis. *Leyva*, 716 F. 3d at 514.

B. The Order Also Contravenes Applicable California State Law.

Class certification decisions are procedural rather than substantive, so federal, not state, procedural law governs. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Nevertheless, "[b]ecause the class action is a procedural vehicle for the vindication of underlying rights, the damages that each class member is entitled to is ultimately a function of other substantive law." *Vaccarino v. Midland Nat'l Life Ins. Co.*, 2014 U.S. Dist. LEXIS 18601, *35 (C.D. Cal. Feb. 3, 2014), citing 28 U.S.C. § 2072 (providing that federal rules of procedure "shall not abridge, enlarge or modify any substantive right"). In other words, while the certification decision is governed by Rule 23, the

calculation of damages and restitution under California statutes, including the aggregated claims of a class, is a matter of California law.

The Court may therefore wish to note that California's highest court also holds that questions regarding determination of damages do not prevent class certification. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1054 (2012). Under California law, "damages may be computed even if the result reached is an approximation." *GHK Assocs. v. Mayer Group, Inc.*, 224 Cal. App. 3d 856, 873 (1990). Federal courts have accordingly found that "under California law, plaintiffs are required to, at most, provide ***a reasonable estimate*** of their damages . . .." *Vaccarino, supra*, at 35-36. (holding that "the defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision.")

In *Brinker*, Justice Werdegar set forth California's black-letter approach to the issue of damages calculations and class certification:

> We have long settled that individual damages questions will rarely if ever stand as a bar to certification. In almost every class action, factual determinations of damages to individual class members must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution.

Brinker, 54 Cal. 4th at 1054 (Werdegar, J., concurring) (internal quotations, alterations, and citations omitted). Moreover, "to decertify a class on the issue of

damages or restitution may well be effectively to sound the death-knell of the class action device." *Id.*

C. The Order Rests on Illogical Factual Findings and Inferences.

In addition to manifest errors of law, the court made several critical factual errors, including:

1) misstating the required inputs to Plaintiff's proposed damages model;

2) incorrectly concluding that Plaintiff did not have sufficient record evidence for a jury to estimate classwide damages; and

3) incorrectly assuming that Plaintiff would be unable to obtain any additional price information prior to or at trial if such evidence were needed.

1. The District Court incorrectly assumed that Plaintiff's damages model required actual retail price to calculate class damages

The District Court in its Order incorrectly cited Plaintiff's proposed damages model as if it depended *exclusively* on an average retail price ("ARP") for the Products. This was not correct. Plaintiff had proposed in his motion for class certification a damages model based principally on the average suggested retail price ("ASRP"), not solely on the ARP as the court presumed. Doc. 65-1 at 20. Plaintiff proposed using ARP only as an alternative measure of damages. *Id.* at 21. Plaintiff already has obtained ASRP evidence in discovery, so the court's finding that Plaintiff has "no data" for his model is simply incorrect. *See* Weston Decl. in Support

of Motion for Reconsideration ¶¶3-8, Exs. 1-6 (filed under seal).

In the decertification order, the court cited Plaintiff's proposed damages model correctly but then analyzed it incorrectly. First it correctly described Plaintiff's model,

> Thus, using the average suggested retail sales price for [Cobra], which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class."

Doc. 175 at 7 (citing Doc. 65-1 at 20-21 (emphasis added)).

This was accurate. The model is based on suggested retail prices, not actual. Plaintiff proposed in his successful Motion for Class Certification that,

> [t]he amount spent on Cobra by the class can be established by Defendants' own sales data and suggested retail sales prices produced in discovery.
>
> . . . .
>
> Thus, using the average suggested retail sales price for the Product ("MSRP"), which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class. *See id.* In the alternative, the out-of-pocket dollars spent by the class on the Product can be acquired by Plaintiffs from companies that collect point-of-sale information, such as Spins.

Doc. 65-1 at 28 (emphases added.).

Unfortunately, the District Court then proceeded to analyze the damages model as if it was based instead only on the ARP, not the ASRP as Plaintiff proposed and as the court initially approved. The court failed to note that Plaintiff already had obtained in discovery sufficient data on suggested retail prices to calculate damages using the proposed model.

The court therefore erroneously concluded, referring to ARP, that, "In the instant case, there simply is no evidence to calculate damages under Plaintiff's damages model is what stops the analysis." [sic] Doc. 175 at 10.

This was a manifest error of fact, per the court's own recitation of Plaintiff's model which uses ASRP, not ARP data.[5] All that Plaintiff needs to calculate damages under this model is Defendant's ASRP and unit sales, both of which he already has. *See* Weston Decl. in Support of Motion for Reconsideration ¶¶3-8, Exs. 1-6 (filed under seal). Thus, Plaintiff already has a validated model and sufficient data to calculate proposed class damages using that model. The District Court erred when it found otherwise.

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[5] Plaintiff had proposed using principally the ASRP, with ARP only as a backup method of calculating class damages. The court's 2014 Order certifying the Class used the phrase, "average retail price" without clarifying whether the court meant the "average suggested retail price" (ASRP), the "average actual retail price" (ARP), or both. Plaintiff consistently proposed the average suggested retail price (ASRP) as the primary measure of damages, *see* Doc. 65-1 at 20, Doc. 65-2 ¶¶ 26-27, and that is the formula the court recited in the February 20, 2015 Order. Doc. 175.

2. Plaintiff presented sufficient retail pricing data.

The District Court found as a matter of law that "without the average retail price, class wide damages cannot be calculated." Doc. 175 at 9. This is a misstatement of California law governing damages for consumer fraud. It is further wrong because Plaintiff did have such data.

A. Contrary to the court's finding, Plaintiff has retail price data.

Plaintiff already has some retail price data from deposition testimony and from Defendant's direct website sales to consumers. *See* Weston Decl. in Support of Motion for Reconsideration ¶¶3-8, Exs. 1-6 (filed under seal). He further has Defendant's suggested retail prices. *See, e.g., Brinker,* 54 Cal. 4th at 1054. While Defendant should be free to attack these sources of evidence of damages as overstating the true amount, for example by showing that some retailers sold the product for less than MSRP, that is an issue to be reached only after a finding of liability, and should be decided by a jury at trial, not by the Court on a decertification motion. *See McCrary*, 2014 U.S. Dist. LEXIS 8443, at *50 (holding that even if damages need to be recalculated at trial, such a "reduction in allowable damages . . . is not fatal to class certification.").

B. Plaintiff can adduce additional retail price information at trial.

Plaintiff can also develop additional proof of damages at trial, through testimony of class members, adverse witnesses, or representative retailers. Justice

Werdegar has specifically recommended representative testimony at trial "to [facilitate] determinations of the extent of liability" when damages may be uncertain. *Brinker, supra* at 1054. For the District Court to assume that no additional price data could possibly be admitted into evidence at trial was plain error.

C. The District Court's Refusal to Permit the Introduction of Wholesale Price Data For Damages is Nonsensical and Contrary to California Law

Plaintiff, in moving for summary judgment while the Class was still certified, provided another model for class calculation of damages, one that, unlike retail prices for which perfect records do not exist, is beyond dispute: the actual wholesale revenue received by Defendant from the sale of Cobra during the class period. *See* Doc. 129 at 23-24. Even assuming, *arguendo*, that aggregated damages have to be calculated perfectly under California consumer law, and Plaintiff lacked evidence to do so, the revenue data was obtained directly from Defendant and is perfectly precise. Indeed, Plaintiff's motion for summary judgment provided a figure down to the very penny: $176,999.28 in restitution and $34,951.16 in prejudgment interest. *See* Doc. 129-2.

The District Court rejected the use of the lower but perfectly precise wholesale data as an alternative to the higher, but less precise retail data:

> Using the sales data alone, Plaintiff seeks to disgorge Defendant of what Defendant received from its wholesale sales, but as previously

> mentioned, Plaintiff and his class members do not have an ownership interest in those sales.

How, if a Plaintiff can prove he was defrauded by being sold a worthless and dangerous unapproved drug, can he have an "ownership interest" in the full retail price he paid for the product, but not the lessor amount representing the wholesale price is never explained by the District Court. It certainly fails as a matter of logic: if Plaintiff was defrauded of $20 from the sale of Cobra at a store, and the $20 is an appropriate measure of restitution, how could the lessor wholesale price of $10 not also be funds in which he enjoys "an ownership interest?"

The District Court also erred in disregarding long-standing precedent in favor of effecting restitutionary damages. California law authorizes a trial court to order a defendant simply to disgorge the money defendant gained by defrauding a class. *See Guido v. L'Oreal, USA, Inc.*, 2013 WL 3353857, at *14 (C.D. Cal. July 1, 2013). A court of equity may exercise its powers to effect justice, *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 452 (1979), and

> with respect to the restitution permitted under the CLRA and UCL, the Court has 'very broad' discretion to determine an appropriate remedy award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff ***the amount that the defendant wrongfully acquired.***

Wiener v. Dannon Co., 255 F.R.D. 658, 670 (C.D. Cal. 2009)(emphasis added). *See also* Restatement (Third) of Restitution and Unjust Enrichment § 44 cmt. a

(2011) ("Restitution by this rule will sometimes yield a recovery where a claimant could not prove damages . . . .")

II. THE ORDER IS QUESTIONABLE AND SOUNDS THE DEATH-KNELL OF THE CASE

Plaintiff's individual monetary claim is small, far outweighed by the cost of litigation. *See Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009) ("where the high costs of litigation grossly exceed an individual plaintiff's potential damages, the denial of class certification sounds the death knell of that plaintiff's claims"). "Rule 23(f)'s text and purpose counsel a broad reading of 'death-knell situation.'" *Dalton v. Lee Publ'ns, Inc.*, 625 F.3d 1220, 1222 (9th Cir. 2010) (O'Scannlain, J., dissenting) (citing *Chamberlan*, 402 F.3d at 960). Here, Plaintiff alleges he purchased Cobra about ten times and paid $16-17, and alleges no other individual damages than the purchase price of the product. *See* SAC at ¶18. His claim is thus for under $200.

III. THE ORDER PRESENTS A FUNDAMENTAL AND UNSETTLED QUESTION REGARDING CLASS CERTIFICATION

Although the Ninth Circuit has been clear in its guidance regarding damages calculations and class adjudication, *see Leyva, supra*; *and see, e.g., ConAgra, supra*, the District Court struggled with the question and its decision is contrary to both the order granting class certification prior to the case being reassigned, as well as the many other cases where retail-product

consumer class actions are certified. Either the issue is settled law and the District Court's ruling is manifestly in error, or the issue is unsettled in the lower courts. In either case, in this "death-knell" situation, the Court should grant Lambert's Petition.

CONCLUSION

The District Court's decertification is manifestly in error, as to both facts and law. It further sounded the death knell of this action, just as much as an appealable judgment against him would have. *Chamberlan*, 402 F.3d at 957, 959. For these reasons, petitioner Troy Lambert respectfully requests review the Order.

Dated: July 8, 2015

Respectfully Submitted,

/s/ Gregory S. Weston

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[*Proof of Service Omitted in Printing of this Appendix.*]

Appellate Case No.: 15-80119 — Filed July 20, 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Troy Lambert, *Plaintiff-Petitioner*,
vs.
Nutraceutical Corp., *Defendant-Respondent*.

Petition for Leave to Appeal from the United States District Court for the Central District of California, Court Case No. 2:13-cv-5942-AB-(Ex)
The Honorable André Birotte, Jr., Presiding

DEFENDANT-RESPONDENT'S OPPOSITION TO PETITION FOR PERMISSION TO APPEAL UNDER FED. R. CIV. P. 23(f)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Defendant-Respondent Nutraceutical Corp. states that the parent company of Nutraceutical Corp. is Nutraceutical International Corp. Nutraceutical International Corp. owns 100 percent of Nutraceutical Corp.'s stock.

Dated: July 20, 2015 By: /s/ John C. Hueston
John C. Hueston

[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

I. INTRODUCTION

The petition at issue here is time-barred and should be denied for that reason alone. Federal Rule of Civil Procedure Rule 23(f), which governs interlocutory appeals from "order[s] granting or denying class-action certification," provides 14 days to file a petition for permission to appeal such an order. The Rule's time limit is strict and unyielding; indeed, this Court has stated it can consider a petition ***"only if"*** it was filed within the prescribed 14-day window. *Plata v. Davis*, 329 F.3d 1101, 1107 (9th Cir. 2003) (emphasis added); *see also Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (the "fourteen day filing requirement is a rigid and inflexible restriction") (citation omitted); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (characterizing the time limit as "clearly strict and mandatory"); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190 n.1 (10th Cir. 2006) (timeliness requirement is "mandatory"). Here, Petitioner did not file his Rule 23(f) petition until ***139 days*** after the district court entered its decertification order—*i.e.* 125 days too late. His petition is therefore untimely, and should be denied.

Remarkably, Petitioner fails to even acknowledge this fatal deficiency. Instead, he suggests—in a footnote—that the petition should be considered timely because it was filed within 14 days of the district court's order denying his motion for reconsideration of the decertification order. But this is not the law.

First, an order denying a motion for reconsideration does not itself qualify as an "order granting or denying class-action certification" under Rule 23(f) because it does nothing more than preserve the status quo. Thus,

the order denying Petitioner's motion for reconsideration did not open a new 14-day window for filing his petition. The operative date for calculating timeliness is thus February 20, 2015, when the district court entered its decertification order. Tellingly, Petitioner advances no argument that his petition is timely in reference to this date, nor could he given that he filed the petition on July 8, 2015—more than ***four months after*** that order was entered.

Second, to the extent Plaintiff seeks to take advantage of a narrow exception this Court has never recognized, which tolls Rule 23(f)'s time limit where a motion for reconsideration was filed within the Rule's 14-day window, his petition still fails. Even if this Court were to follow other Circuits and recognize this narrow exception, it would not help Petitioner because he did not move for reconsideration until ***20 days*** after the decertification order was entered, rendering his petition ineligible for tolling. Thus, under any analysis, the petition is untimely, and should be rejected on this basis alone.

Nevertheless, even if the petition were not time-barred under Rule 23(f)—and it is—it should still be denied because Petitioner has fallen far short of meeting the exacting burden necessary to justify interlocutory review—a form of relief this Court has held should be "granted sparingly." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). While Petitioner argues the district court issued a "questionable" decertification order, containing manifest errors of both law and fact, he does so only by mischaracterizing the district court's reasoning, misstating the factual record, and failing to

substantively engage in the relevant case law. Prior to discovery, the district court certified the class in this case based upon representations Petitioner and his former co-lead plaintiff—who was dismissed with prejudice after he was caught lying under oath in his deposition—made about evidence they would obtain during discovery. Following the close of discovery, the district court correctly found that Petitioner had "failed to produce the evidence needed" to support his sole class-wide damages model, and therefore decertified the class. Exhibit A at 11 (Decert. Order) [Dkt. 175]. Far from containing the type of errors required to obtain "rare" relief under Rule 23(f), the district court's order, as described in detail below, was supported by ample case law and a clear understanding of the record.

For these reasons, the petition should be denied.

II. QUESTIONS PRESENTED

Should this Court grant "rare" interlocutory review under Rule 23(f) where:

1) Petitioner failed to file a timely petition, as required by the Federal Rules; and

2) Where Petitioner failed to show that the decertification order contained manifest errors of fact or law, or that it presented a fundamental and unsettled question of class-action law.

III. BACKGROUND

On August 14, 2013, Petitioner, along with his former co-lead plaintiff Frank Ortega, filed the underlying suit against Respondent Nutraceutical

Corp. ("Nutraceutical"), alleging violations of California's false advertising and unfair competition laws related to his purchases of Cobra Sexual Energy ("Cobra"), a dietary supplement comprised of herbs, extracts, and other plant-based materials. Ex. B (Compl.) [Dkt. 1]; Ex. C (Order Dismiss. Ortega With Prejudice) [Dkt. 121]. Petitioner sought to represent a class of all persons who had previously purchased Cobra in California.

Relying on a number of Petitioner's representations that have since been proven false, the district court certified the class on July 14, 2014. *See* Ex. D (Mot. for Cert.) [Dkt. 65-1]; Ex. E (Order Grant. Cert.) [Dkt. 80]. For example, Petitioner promised to "use expert testimony, such as a consumer survey expert" to establish class commonality. Ex. D at 16. Yet he never retained a single expert. *See* Ex. F at 3 (Def's Mot. to Decert. Class) [Dkt. No. 111]. Petitioner also promised he would prove his sole damages theory by using "an average retail price." Ex. E at 13. Yet after months of opportunity during discovery, he failed to obtain any evidence of Cobra's average retail price. Ex. A at 11. When it became clear Petitioner could no longer satisfy his burden of showing certification was warranted, Nutraceutical moved to decertify the class. Ex. F. The district court agreed with Nutraceutical and, on February 20, 2015, granted decertification on the grounds that Petitioner could not demonstrate a class-wide calculation of damages. Ex. A at 4. Because this issue was dispositive, the court declined to reach the other issues raised in the decertification motion, which likewise compelled decertification.

Subsequently, at a March 2, 2015, status conference, Petitioner requested permission from the district court to file a "renewed motion for class certification." Ex. G at 4 (Stat. Conf. Tr.). The court denied his request. *Id.* at 7. Petitioner then moved for reconsideration on March 12, 2015—20 days after the class was decertified. Ex. H (Mot. for Recon.) [Dkt. 183]. The district court denied his motion for reconsideration on June 24, 2015, finding that he had failed to identify "any new evidence or law" that could not have been previously presented to the court, or any clear or manifest error. Ex. I (Order Den. Mot. for Recon.) [Dkt. 195]. Petitioner then filed this Rule 23(f) petition on July 8, 2015—more than four months after entry of the decertification order.

IV. ARGUMENT

A. The Petition is Untimely and Thus Barred by Rule 23(f).

Rule 23(f) allows a court of appeals to "permit an appeal from an order granting or denying class-action certification…if a petition for permission to appeal is filed within 14 days after the order is entered." Fed. R. Civ. P. 23(f). The 14-day filing window is "deliberately small," to limit the petition's likely disruptive effect on the ongoing case. *See Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999). And every Circuit to consider the issue has strictly construed Rule 23(f)'s timing requirement. *See Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (the "fourteen day filing requirement is a rigid and inflexible restriction") (citation omitted); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (characterizing time limit as "clearly strict and mandatory"); *Carpenter v. Boeing*

Co., 456 F.3d 1183, 1190 n.1 (10th Cir. 2006) (timeliness requirement is "mandatory").

Here, the district court entered its order decertifying the class on February 20, 2015. Ex. A. Thus, to comply with Rule 23(f), Petitioner was required to file his petition by March 6, 2015—*i.e.* 14 days after the order's entry. Instead, he filed it on July 8, 2015—***four months*** after the filing window closed.

While Petitioner argues that his petition is nonetheless timely because he filed it within 14 days of the district court's order denying his motion for reconsideration of the earlier decertification order, Pet. 3 n.1, he is mistaken. Under well-established law, the only relevant date is February 20, 2015, the date the district court decertified the class. *See, e.g.*, *Gutierrez*, 523 F.3d at 193; *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014). Petitioner does not (because he cannot) dispute he missed that deadline.

1. An Order Denying a Motion for Reconsideration Does Not Open a New Window for Filing a Rule 23(f) Petition.

Petitioner asserts that, because his motion for reconsideration sought recertification of the class, the district court's denial of that motion is an "order [] denying class certification" under Rule 23(f) and should open a new 14-day window for filing his petition. Pet. 3 n.1. Yet ***every Circuit to consider this issue*** has rejected Petitioner's argument, holding that, regardless of how it is styled, "an order that leaves class-action status unchanged from what was determined by a prior order is not an order granting or denying class action

certification," and thus does not trigger a new time period for filing under Rule 23(f). *See Gutierrez*, 523 F.3d at 193; *Nucor Corp.*, 760 F.3d at 343 (same); *In re DC Water and Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009) (same); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (same); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006) (same); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11th Cir. 2007) ("[W]hat counts is the original order denying or granting class certification, not a later order that maintains the status quo.").

Remarkably, the single case Petitioner cites in support of his timeliness argument, *Gutierrez*, ***directly refutes*** his assertion and mandates his petition's denial. *See Gutierrez*, 523 F.3d at 194. As in this case, the petitioner in *Gutierrez* did not argue that his Rule 23(f) petition was timely in relation to the court's original order denying certification; rather, he claimed that the court's denial of his motion for reconsideration counted as another denial of class certification, and therefore triggered a new time period for filing under Rule 23(f). The Third Circuit rejected this argument, holding that because the district court's denial of the motion for reconsideration "did not change the status quo," but "merely affirmed [the] decision not to certify the class," it did "not qualify as an order 'granting or denying class action certification' within the meaning of Rule 23(f)," and thus did not create a new opportunity for filing a Rule 23(f) petition. *Id.* (quoting Fed. R. Civ. P. 23(f)).

Here, Petitioner employs the same faulty reasoning as the *Gutierrez* petitioner, arguing that because his motion for reconsideration sought recertification of the

class, its denial should be subject to a 23(f) petition. Pet. 3 n.1. But—just as in *Gutierrez*—the district court's denial of Petitioner's motion for reconsideration "did not change the status quo." It simply affirmed the court's earlier order decertifying the class. Thus, *Gutierrez*'s holding should apply just as forcefully in this case.

The logic of the Third Circuit's *Gutierrez* holding is unassailable. As the Seventh Circuit correctly recognized, if a petitioner were allowed to "styl[e] [his] motion to reconsider as a motion to [re]certify the class," he would be able effectively to "defeat the function of the [14-day] line drawn in Rule 23(f)." *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999). That function is to "promote judicial economy," by providing only a "single window of opportunity to seek interlocutory review." *Jenkins*, 491. F.3d at 1290. Courts are rightly wary of parties who seek to subvert the framework established by the Rule. *See Carpenter*, 456 F.3d at 1190 ("Accepting an appeal from such a decision [leaving] the class definition in place would abandon the time limit for all practical purposes. That step would be both unauthorized and imprudent.") (internal brackets, quotation marks, and citation omitted).[1] Litigants cannot be allowed to undermine the Rules' legitimate concerns regarding judicial economy and the disruptive nature of interlocutory

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[1] Petitioner attempted just such a subversion here: At a status conference following the district court's order decertifying the class, the district court expressly denied Petitioner's request to treat his then-forthcoming motion for reconsideration as a "renewed motion for class certification under Rule 23." Ex. I at 4 n.1.

appeals by continually seeking recertification of the class, waiting for the court to deny their motion, and then filing a Rule 23(f) petition in this Court. The Rule is clear: *It* sets the time for filing a petition, not Petitioner.

This Court should now join the Third, Fourth, Fifth, Tenth, Eleventh, and D.C. Circuits in explicitly holding that where a district court's order does not change the status quo and merely affirms the court's prior order, it does not create a new time period for filing a Rule 23(f) petition. The fact that Petitioner here filed a Rule 23(f) petition within 14 days of the district court's order denying his motion for reconsideration is immaterial, because the reconsideration order left the "class-action status unchanged from what was determined" by the district court's prior decertification order. *See Gutierrez*, 523 F.3d at 193.

2. Petitioner's Motion for Reconsideration Did Not Toll Rule 23(f)'s 14-Day Time Limit.

While other courts of appeal have held that filing a "timely and proper motion for reconsideration" tolls the time limit imposed by Rule 23(f), this "narrow exception" is inapplicable here. *See Gutierrez*, 523 F.3d at 193. Petitioner vaguely alludes to this exception, stating that, following decertification, he "promptly sought leave to file a motion for reconsideration," which he later filed in compliance with the schedule set by the district court. Pet. 3 n.1. But even if this Court were to join other Circuits in adopting this exception, it would not in any way change the outcome here, because for a reconsideration motion to be "timely" for purposes of tolling the Rule 23(f) time limit, it must be filed ***within***

14 days of the order granting or denying certification—a critical and dispositive distinction Petitioner fails to mention. *See Gutierrez*, 523 F.3d at 193 ("We stress that, for the purpose of tolling the time within which to file a Rule 23(f) petition, a 'timely' motion to reconsider is one that is filed within the [14-day] period set forth in Rule 23(f)."); *Gary*, 188 F.3d at 892 ("[I]f the request for reconsideration is filed more than [14 days] after the order 'granting or denying class action certification under [Rule 23(f)],' then appeal must wait until the final judgment.") (quoting Fed. R. Civ. P. 23(f)). Here, Petitioner filed his motion for reconsideration on March 12, 2015—***20 days*** after the district court entered its order decertifying the class. Thus, the motion failed to toll the time limit prescribed by Rule 23(f), and the window for filing this petition closed on March 6, 2015—*i.e.* 125 days before it was actually filed.

As the Third Circuit has explained, "the fact that the [reconsideration] motion was timely for the purposes of the District Court's schedule does not necessarily make it timely for an appeal to this [Circuit] Court." *Gutierrez*, 523 F.3d at 194. Rather, "[i]t is the [14-day] period in Rule 23(f), ***and not any other schedule or time period***, that dictates whether a motion to reconsider will toll Rule 23(f)'s strict time period . . . ." *Id.* (emphasis added). In other words, whether or not Petitioner filed his motion for reconsideration by the date set by the district court is irrelevant under Rule 23(f). All that matters is whether the motion was filed within 14 days of the order decertifying the class. It was not, and Petitioner does not—and cannot—dispute this.

In short, the petition should be rejected as untimely under Rule 23(f). Because the petition is untimely, it is not "authorized by a statute or rule" as required by the Federal Rules of Appellate Procedure, and must therefore be denied. *See* Fed. R. App. P. 5(b)(1)(D).

B. Even if the Petition Were Timely, Petitioner Still Fails to Meet the Standards Required for Rule 23(f) Review

This Court has held that "petitions for Rule 23(f) should be granted sparingly." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005). To justify such relief, a petitioner must show that:

> (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id. Despite his assertions to the contrary, Petitioner cannot meet any of these standards.

1. The District Court's Order Decertifying the Class Was Not Manifestly Erroneous.

Petitioner first argues that the "district court committed manifest errors of both law and fact." Pet. 6. To warrant Rule 23(f) review under this standard,

"[t]he error in the district court's decision must be significant; bare assertions of error will not suffice. Any error must be truly 'manifest,' meaning easily ascertainable from the petition itself." *Chamberlan*, 402 F.3d at 959. Here, the district court's analysis was consistent with applicable law and properly applied the law to the facts of this case. In doing so, the district court reached the inescapable conclusion that Petitioner had failed to produce the evidence necessary to demonstrate class-wide damages and thus could no longer meet his burden of showing that class certification remained warranted. *See Marlo v. United Parcel Serv.*, 639 F.3d 942, 947 (9th Cir. 2011) (burden of proof on a motion for decertification remains with the party advocating for class certification).

(a) The District Court's Order Correctly Applied Applicable Law.

Following the close of discovery, the district court decertified the class, holding that Petitioner had "failed to provide the key evidence necessary to apply his classwide model for damages...." Ex. A at 11. At issue in the decertification order was Petitioner's full-refund theory of damages—the sole damages theory Petitioner advanced at the certification and decertification stages.[2] *Id.* In order to work, Petitioner's model

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[2] In his motion for reconsideration, Petitioner improperly introduced for the first time an alternative "restitutionary-disgorgement model" for damages. Ex. H at 12. The district court held that this argument had been waived because Petitioner had failed to brief it in his opposition to the decertification motion or to mention it at oral argument. Ex. I at 8. Nonetheless, the district addressed Petitioner's newly offered damages model and found that it failed for the same reasons as the full-refund model. *Id.*

required evidence of the average retail price class members actually paid for Cobra from third-party retailers, because the damages sought "serve[d] to provide what the class members *lost*, not what the Defendant gained." Ex. A at 8 (emphasis added). At the certification stage, Petitioner promised he would obtain such evidence during discovery via "expert accountant testimony" and "independent, third parties that gather point-of-sale data." Ex. J at 20 (Reply in Supp. Mot. to Cert.) [Dkt. 75]. Yet, following months of discovery, Petitioner failed to obtain any such information, rendering his damages model unworkable on a class-wide basis. As the district court correctly held, citing numerous on-point authorities, "Missing this calculation is a defect in Plaintiff's evidence that is fatal to his class claims because restitution serves to provide what the class members lost, not what the Defendant gained." Ex. A at 7-8 (citing *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097 at *12-13 (N.D. Cal. Jan. 7, 2014) ("Restitutionary relief is an equitable remedy, and its purpose is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest.") (internal quotation marks omitted)).

Having failed to provide the necessary average retail price, Petitioner attempted to rely on Nutraceutical's own sales data. *Id.* at 9. Citing additional relevant authority and properly applying Rule 23(b)(3), the district court rejected Petitioner's argument, finding that Nutraceutical's own sales data was insufficient to calculate class-wide damages because Nutraceutical does not (except in rare instances) sell Cobra directly to consumers. Rather, Cobra is sold via third-party retailers who—the

evidence showed—set widely different prices. Ex. A at 9 (citing *Caldera v. J.M. Smucker Co.*, CV 12-4936-GHK VBKX, 2014 WL 1477400, at *4 (C.D. Cal. Apr. 15, 2014) ("[C]lasswide damages cannot accurately be measured based on Defendant's sales data alone."); *Astiana*, 2014 WL 60097 at *12-13 (denying class certification because the plaintiff failed to provide evidence regarding damages)). Thus, the district court held, Petitioner's model was deficient under *Comcast* and required decertification.[3] *See Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1433 (2013).

Petitioner now argues the district court erroneously decertified the class because "uncertainty in damages calculations does not call into question predominance for class certification purposes." Pet. 8. All Petitioner needed to show, he argues, is that "the proposed method for calculating damages [was] plausible." *Id.* Petitioner's argument, however, reflects a fundamental lack of understanding of the district court's decision. The district court did *not* find that the damages model had to produce precise calculations; to the contrary, it clearly stated, "The Court recognizes that calculating damages need not be exact or 'mathematically precise' at this stage, but the Court will not ignore Plaintiff's

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[3] Petitioner improperly introduced a second new argument in his motion for reconsideration, suggesting that the jury could calculate the average retail price by relying on (i) Defendant's suggested retail price; (ii) the Plaintiff's own recollection of what he paid for Cobra; and (iii) the price of Cobra on Defendant's web site, from which it sold a de minimis amount of product directly to consumers. But even if this newly offered "evidence" had been properly presented (it was not), Petitioner failed to show how a jury could rely on such information to calculate an average retail price. *Id.* 10-16.

speculative approach in relying [in part] on price suggestions within a product guide as a basis to determine an average retail price." Ex. I at 14 n.8 (citing *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (the law "requires only that damages be capable of measurement based upon reliable factors without *undue speculation*") (emphasis in original)). Moreover, the district court never disputed that, "[u]nder California law, damages may be computed even if the result reached is an approximation," or that "plaintiffs are required to, at most, provide a reasonable estimate of their damages." Pet. 12-13 (internal quotation marks and citations omitted). Rather, the district court determined that, ***in order to provide a reasonable estimate at all***, Petitioner's model required evidence of "the average retail price used in selling" Cobra, which Petitioner had failed to gather despite months of opportunity during discovery. *Id.* at 13 n.7.

Petitioner's continued reliance on *Leyva v. Medline Indus.*, 716 F.3d 510 (9th Cir. 2013) is similarly misguided. Petitioner cites *Leyva* for the proposition that "[u]ncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages." Pet. 8 (citing *Leyva*, 716 F.3d at 514). But *Leyva* simply held that "the presence of individualized damages cannot, ***by itself***, defeat class certification under Rule 23(b)(3)." *Leyva*, 716 F.3d at 514 (emphasis added). In *Leyva*, a class of employees implicated individualized damages because not every member of the class earned the same wage or worked the same number of hours. The court held that, even though the damages may not be uniform, class decertification was

not required. *Id.* Critically, though, in *Leyva* "the plaintiffs ***had a workable damages model*** that matched their theory of liability." Ex. A at 10 (emphasis added). Here, on the other hand, Petitioner failed to provide "any evidence to calculate damages." Ex. I at 10 ("The absence of an average retail price makes it impossible to calculate damages either classwide *or* on an individual basis.") *Id.* (emphasis added). *Leyva* is therefore inapposite.

(b) The District Court's Order Correctly Applied Applicable Law to the Facts of this Case.

Petitioner's argument that the district court made "several critical factual errors," simply repackages his earlier arguments regarding the court's application of law. *See* Pet. 13. For instance, Petitioner claims that that the district court erred in finding that he had "no data" for his model because he had, in fact, obtained an "average *suggested* retail price." Pet. 14 (emphasis added). But the district court clearly stated that Petitioner's damages model could not rely on a suggested retail price because it "fail[ed] to take into account the retailer's discretion [in pricing Cobra,] which is why the Court expected Plaintiff to collect data and present an average retail price." Ex. I at 12. As such, the fact that Petitioner obtained an average suggested retail price is irrelevant.

Similarly, Petitioner claims that the district court erred in finding there was no evidence of an average retail price, because—in addition to the average *suggested* retail price he had obtained—Petitioner also had "some retail price data" from his own deposition testimony and Nutraceutical's web site. Pet. 16. As the

district court thoroughly laid out in both its order decertifying the class and its order denying Petitioner's motion for reconsideration, "Even assuming *arguendo* that such [suggested] retail prices are appropriate in measuring restitution, Plaintiff leaps to the conclusion that a jury could somehow determine an average retail price using these set[s] of numbers. . . . But Plaintiff ignores the question of how picking one suggested retail price . . . automatically configures an *average*.") (emphasis in original). Ex. I at 14. While Petitioner may disagree with the district court's reasoning, disagreement over the outcome of a decertification order does not warrant interlocutory review.

As the Seventh Circuit has articulated, a "manifest error is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co*, 224 F.3d 601, 606 (7th Cir. 2000). Here, Petitioner offers nothing more than his disappointment that the district court decertified the class. Far from demonstrating the district court's "wholesale disregard" or "misapplication" of the law or factual record, Petitioner can only make the same unavailing arguments he has relied on at every stage of this litigation. In sum, Petitioner has failed to show manifest error.

2. Regardless of Whether the Decertification Order Sounded the "Death-Knell" For Petitioner's Case, Interlocutory Review is Not Warranted Because Petitioner Failed to Show Error in the Decertification Order.

Petitioner next argues that, because his individual monetary claim is small, decertification created a death-knell scenario in the case, making it ripe for interlocutory review. Pet. 19. Yet even if that were true, under well-established precedent, review is only appropriate if—in addition to the death-knell—there is "error in the certification order." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 960 (9th Cir. 2005); *see also Blair v. Equifax Check Serv., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). ("However dramatic the effect of the grant or denial of class status in undercutting the plaintiff's claim or inducing the defendant to capitulate, if the ruling is impervious to revision there's no point to an interlocutory appeal."). As demonstrated above, Petitioner fails to show any error—manifest or otherwise—in the district court's order. Therefore, regardless of the decertification order's effect on the case, the order does not warrant interlocutory review.

3. The Decertification Order Does Not Present any Fundamental and Unsettled Question of Law Regarding Class Certification.

Taking a kitchen-sink approach, Petitioner concludes his petition with a confusing, three-sentence section entitled, "The Order Presents a Fundamental and Unsettled Question Regarding Class Certification."

Pet. 20. Yet Petitioner fails to cite ***a single such question***, nor does he even attempt to cite or discuss any purportedly conflicting case law. What is more, Petitioner even admits that "the Ninth Circuit ***has been clear*** in its guidance regarding damages calculations and class adjudication..." *Id.* (emphasis added). Under these circumstances, "immediate review" under Rule 23(f) is both unnecessary and inappropriate. *See Sumitomo Copper Litigation v. Credit Lyonnais Rouse, Ltd.*, 26 F.3d 134, 140 (2d Cir. 2001).

V. CONCLUSION

In sum, the Rule 23(f) petition at issue here is time-barred and should be denied for that reason alone. This Court should join every other Circuit to consider the issue and hold that an order which preserves the status quo and leaves class status unchanged does not open another window for filing a Rule 23(f) petition. And even if the petition were not time-barred, it falls far short of meeting the exacting standards required for Rule 23(f) review. The petition should therefore be denied.

Dated: July 20, 2015

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-80119
D.C. No. 2:13-cv-05942-AB-E
Central District of California, Los Angeles

Filed September 16, 2015

TROY LAMBERT, on behalf of himself and all others similarly situated, Plaintiff - Petitioner,	)
v.	)
NUTRACEUTICAL CORP., Defendant - Respondent.	)

ORDER

Before: REINHARDT and RAWLINSON, Circuit Judges.

The court, in its discretion, grants the petition for permission to appeal the district court's February 20, 2015 order granting the motion for class decertification and the June 24, 2015 order denying the motion for reconsideration of the February 20, 2015 order. *See* Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam). Within 14 days after the date of this order, petitioner shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d).

In addition to all other issues the parties wish to raise in their briefs in the appeal, the parties shall

address the timeliness of this petition No. 15-80119. *Cf. Briggs v. Merck Sharp & Dohme*, Nos. 15-55873, 15-55874, 15-55875, 15-55876, 15-55877, 2015 WL 4645605 *5-6 (9th Cir. August 6, 2015) (after the petitions for permission to appeal were granted, the merits panel considered the timeliness of the petitions).

No. 15-56423 — Filed January 27, 2016

***In the* United States Court of Appeals**
***for the* Ninth Circuit**

TROY LAMBERT,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant
v.
NUTRACEUTICAL CORPORATION,
Defendant-Appellee.

Appeal from an Order of the United States District Court for the Central District of California, Case No. 2:13-cv-5942-AB-(Ex)

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[*Table of Contents and Table of Authorities Omitted in Printing of this Appendix.*]

STATEMENT OF JURISDICTION

The district court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). Diversity of citizenship is satisfied because Plaintiff-Appellant Troy Lambert is a California resident, while Defendant-Appellee Nutraceutical Corporation ("Nutraceutical") is a Delaware corporation. Plaintiff-Appellant alleged that the aggregate claims of the class exceed the sum or value of $5,000,000, exclusive of interest and costs. Moreover, less than one-third of the members of the putative class are citizens of the state where the action was originally filed and the factors in § 1332(d)(3) weigh in favor of retaining jurisdiction.

On June 19, 2014, the district court granted Plaintiff's Motion for Class Certification. ER243-259. On November 17, 2014, Nutraceutical filed a Motion for Class Decertification, ER215-242, and Plaintiff opposed, ER132-158. The district court held a hearing on December 22, 2014, ER30-73, and Defendant's motion was granted on February 2, 2015. ER19-29. Plaintiff then moved for reconsideration of this order, ER103-130. Nutraceutical opposed the motion, and Plaintiff filed his reply brief on March 13, 2015. ER80-102. On June 24, 2015, the district court denied Plaintiff's motion. ER1-18. On June 8, 2015, Plaintiff filed a Petition to Appeal Pursuant to Fed. R. Civ. P. 23(f), ER78-79, and the district court stayed proceedings pending appeal. ER76-77. Plaintiff's petition was accepted on September 16, 2015, and Plaintiff timely filed his Notice of Appeal on September 21, 2015. ER74-75.

The Motions Panel properly granted the 26(f) petition as all three of the factors in *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) are present, even though only one factor would be sufficient. First, the district court's decision to decertify the class sounded the "death-knell" to the case as Plaintiff's individual monetary claim of less than $100 is far outweighed by the cost of litigation. Second, the district court's decision to decertify the class based on supposed inadequate evidence to calculate damages is a manifest error of both fact and law. Finally, if the decision were to stand it would act to unsettle the important legal issue of whether a district court may deny certification based on supposed difficulties of calculating damages or restitution.

QUESTIONS PRESENTED

1. QUESTION 1

Where Appellant's class action was previously certified and Appellant's retail-price-based damages model found satisfactory, where Appellant introduced evidence of the retail prices charged to Class members purchasing the Product on the Defendant's internet retail store and comparable prices paid by Appellant at brick-and-mortar retail stores, and where the district court after reassignment found that Appellant had not presented sufficient evidence of class member's individual damages, where discovery was closed but where additional evidence of retail prices, class members' individual damages, and average class-wide damages was available for introduction at trial through percipient witness testimony, was the district court's ruling de-certifying the Class on the basis of

individualized or class-wide damages calculation consistent with Ninth Circuit jurisprudence?

2. QUESTION 2

Did the district court err in holding that the product's average retail price was the only measure of restitution available under California law, rejecting other measures of restitution including Defendant's wholesale revenue, and further err in decertifying the class on that basis?

STATEMENT OF THE CASE

Plaintiff appeals the district court's decertification of a previously-certified class of consumers who were induced to buy an unapproved, unlawful, and fraudulent aphrodisiac drug.

Nutraceutical packages and sells "Cobra Sexual Energy," an ineffective, dangerous, and unapproved purported aphrodisiac. This precise conduct is prohibited by the FDA's Aphrodisiac Drug Rule, 21 C.F.R. § 310.528.

The fraudulent sale of fake, snake oil, "herbal" aphrodisiacs is an ancient problem. The FDA, charged with protecting the public from such fraud, promulgated 21 C.F.R. § 310.528 (the "Aphrodisiac Drug Rule"), to prohibit "aphrodisiac drug product[] claim[s]" by "nutritional supplement" manufacturers. 54 Fed. Reg. 28780, 28780 (July 7, 1989). The Aphrodisiac Drug Rule was promulgated and published in the Federal Register after public notice and opportunity to comment and carries the force of law. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979)

("properly promulgated, substantive agency regulations have the 'force and effect of law'").

The Rule states categorically that "[a]ny product that bears labeling claims that it will arouse or increase sexual desire, or that it will improve sexual performance, is an aphrodisiac drug product" and may not be offered for sale without first undergoing clinical testing and FDA approval. 21 C.F.R. § 310.528(a). The FDA provides several examples of prohibited aphrodisiac claims, including:"arouses or increases sexual desire and improves sexual performance"; "helps restore sexual vigor, potency, and performance"; "improves performance, staying power, and sexual potency"; and "builds virility and sexual potency." *Id.* These are all claims that Defendant makes for "Cobra Sexual Energy" using nearly identical language.

The FDA expressly found unsupportable any claims of effectiveness for any OTC ingredients, including specific ingredients in Cobra, for use as an aphrodisiac. 21 C.F.R. § 310.528(a). The FDA expressly determined that "all products that bear labeling claims that they will arouse or increase sexual desire or that they will improve performance are aphrodisiac drug products," 54 Fed. Reg. 28780, 28786 (July 7, 1989), and that ***"labeling claims for aphrodisiacs for OTC use are either false, misleading, or unsupported by scientific data."*** 21 C.F.R. § 310.528(a) (emphasis added).

Defendant never obtained New Drug Approval from the FDA—or even attempted to do so, ER204-214 at ¶ 2, Exs. 1-2—before it began selling Cobra Sexual Energy to the public with a label advertising "aphrodisiac" ingredients and making explicit

aphrodisiac claims. As such, Cobra is a misbranded new drug offered for sale in violation of federal law.

In addition to these clear and direct violations of the Aphrodisiac Drug Rule, Cobra also violates FDA's general drug and dietary supplement laws. 21 U.S.C. § 343(r)(6) requires that a manufacturer of a dietary supplement making a nutritional deficiency, structure/function, or general well-being claim have substantiation that the claim is (1) truthful (2) not misleading, and (3) bears the disclaimer, "prominently displayed and in boldface type" that "[t]his statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease." Not only does Defendant lack substantiation, but it has never provided such prominent and boldface disclaimer.

On June 19, 2014, the Honorable Audrey B. Collins certified the class of consumers who had purchased Cobra Sexual Energy. Judge Collins found that common issues predominated because "[a]ll of the Plaintiffs' claims depend on the common issue of whether Cobra's labeling is false or misleading." ER252. Three months after Judge Collins's appointment to the California Court of Appeal and the reassignment of this action, Nutraceutical moved to decertify the class. ER215-242. On February 20, 2015, Nutraceutical's motion was granted, solely on the basis that, "although Plaintiff's full refund model is consistent with his theories of liability," ER22, ". . . because Plaintiff failed to provide the key evidence necessary to apply his classwide model for damages, the Court cannot find that common issues predominate under Rule 23(b)(3)." ER29.

This was clear error. This Court instructs "damages is invariably an individual question [that] does not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (citations omitted); *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010).

The district court was also incorrect that Plaintiff did not present a valid damages model supported by evidence. In fact, he presented three separate models, all supported by evidence. He first presented expert evidence that the product was worthless and had a value of $0.00 because it was an unlawful and dangerous unapproved new drug and was completely ineffective. *See* ER159-72. As to the amount that the class should be awarded based on their purchases of a worthless product, he presented evidence allowing a restitutionary award to be calculated under three methods, all supported by California law: (1) the sales of product multiplied by average retail price; (2) the sales of product multiplied by the manufacturer's suggested retail price ("MSRP"); and (3) the revenue from the sale of the product during the Class period that Defendant disclosed in discovery.

Lambert inarguably had already obtained adequate competent evidence to apply at least two of the three models. Even if the district court had been correct that a gap existed in the evidence necessary to calculate damages at the time of the decertification motion for one of those models, the Average Retail Price model, it erred in assuming such information could not have been easily and properly obtained subsequently through further investigation or adduced at trial through witness testimony. The district court thus

erred in decertifying the class and refusing to reconsider its ruling or allow a subsequent motion to certify.

SUMMARY OF ARGUMENT

The district court's original order certifying the class and approving the full-refund damages model was correct. After the case's reassignment, however, the court ignored Ninth Circuit authority regarding damages calculations in cases such as *Leyva v. Medline Indus.*, 716 F.3d 510 (9th Cir. 2013) and concluded that "Plaintiff failed to provide the key evidence necessary to apply his classwide model for damages," decertifying the class based on this erroneous assumption. It did so in the face of competent evidence showing: (1) the retail price paid for multiple purchases of the Product by Plaintiff-Appellant; (2) the retail price actually charged by Defendant to customers purchasing the product from Defendant's internet retail store; (3) Defendant's revenue from the sale of the product; and (4) expert testimony that the value of the product was zero because it was illegal, dangerous, and completely ineffective—as well as the fact that additional price evidence could properly be adduced at trial.

The original certification order correctly found that common questions predominated. *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). If "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then those issues predominate over individual questions. *Id.*

A proposed damages calculation model need only be plausible, *Menagerie Prods. v. Citysearch*, 2009 U.S. Dist. LEXIS 108768, at *62-66 (C.D. Cal. Nov. 9, 2009); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 494 (C.D. Cal. 2006); a criterion that one, two, or all three of Plaintiff-Appellant's proposed models easily meet. *See, also, McCrary v. Elations Co., LLC*, 2014 U.S. Dist. LEXIS, at *50 (C.D. Cal. Jan. 13, 2014).

The district court, however, in ruling for decertification, cited to inapposite authorities including those in which, for example, a district court found that approximately 100 million individual hearings would be needed to resolve class claims for injunctive relief. *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 157 (S.D.N.Y. 2006). The district court also cited two cases in which expert testimony was required to determine a "true value" or price premium for the product at issue, complications not necessary here under Plaintiff-Appellant's model. ER26-27 (citing *Caldera v. J.M. Smucker Co.*, 2014 U.S. Dist. LEXIS 53912, at *11-12 (C.D. Cal. Apr. 15, 2014); *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014)). In addition to being inapposite, these cases are also wrongly decided by misapplying California's law of restitution.

Further, even if no retail price data were available or able to be adduced at trial, under California law, Lambert could still calculate restitution based solely on Defendant's revenues from the sale of the product, figures which are already known. "California law 'requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an

approximation . . . [T]he fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery.'" *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (internal citation omitted).

California law provides that "a defendant, who carefully exploited an unfair trade practice so that the individual victims suffered only minor losses, to disgorge the resulting large and illicit sum of money." *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 452 (1979) (internal citations omitted). And "a court of equity may exercise its full range of powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo* ante as nearly as may be achieved." *Id.* The court has "'very broad' discretion to determine [a restitution] award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff the amount that the defendant wrongfully acquired." *Wiener v. Dannon Co.*, 255 F.R.D. 658, 670-71 (C.D. Cal. 2009) (emphasis added) (quoting *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 695 (2006)). In addition to the retail price data, the wholesale price and revenue evidence that Plaintiff-Appellant had already presented was adequate for a jury to carry out this calculation. The district court therefore also erred when it rejected any alternate damages calculation model based on Defendant's known wholesale price and markup or on Defendant's revenues.

ARGUMENT

I. THE PETITION TO APPEAL IS TIMELY AND WAS CORRECTLY GRANTED

A. Standard of Review for 23(f) Petitions

"A court of appeals may permit an appeal from an order granting or denying class-action certification under" Fed. R. Civ. P. 23(f). "[T]he court of appeals [enjoys] 'unfettered discretion' to grant or deny permission to appeal based on 'any consideration that the court of appeals finds persuasive.'" *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005) (quoting Fed. R. Civ. P. 23, Advisory Committee Notes to 1998 Amendments, Subdivision (f)). Acceptance of an appeal under Rule 23(f) is appropriate where the class certification decision "sounds the death knell of the litigation." *Chamberlan*, 402 F.3d at 957 (quoting *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999)).

B. The Court Correctly Granted Plaintiff-Appellant's 23(f) Petition

This Court has jurisdiction to review an order denying class certification under Fed. R. Civ. P. 23(f) and 28 U.S.C. § 1292(e). Plaintiff's 23(f) petition was timely because it was filed on July 8, 2015, within 14 days after the order denying Plaintiff's motion for reconsideration was entered on June 24, 2015. ER1-18, 78-79. *See* Fed. R. Civ. P. 23(f).[1]

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[1] This Circuit has not addressed whether orders denying reconsideration of decertification orders are subject to 23(f) petitions, though the rule's language of "an order granting or

Interlocutory review under Rule 23(f) allows the Court to "restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial." *Chamberlan*, 402 F.3d at 957-58. Interlocutory review of a certification decision is most appropriate when:

> (1) there is a death-knell situation . . . that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.

Id. at 959.

Chamberlan holds an appeal under Rule 23(f) is appropriate when a plaintiff denied certification could only appeal after judgment on the merits of an individual claim that is worth less than the cost of

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denying class certification" certainly applies here, because Plaintiff's motion for reconsideration sought certification of a decertified class, and the Court's order is thus an "order [] denying class certification." *See Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193 (3d Cir. 2008) ("join[ing] the other circuits in holding" Rule 23(f) petitions are timely where a party files a "timely and proper motion to reconsider the grant or denial of class certification.") Here, the district court explicitly granted leave to file and set a schedule for a motion to reconsider at its post-decertification scheduling conference. ER131.

litigation. Denial of certification in such a case "sounds the death knell of the litigation." *Id.* Here, all three of the *Chamberlan* factors were present: manifest error, fundamental issue of law, and a "death-knell" situation.

First, the district court committed manifest errors of both law and fact. The district court failed to follow Ninth Circuit authority and made dispositive factual findings that were without support in the record, thereby abusing its discretion. Although the Ninth Circuit has been clear in its guidance regarding damages calculations and class adjudication, the district court's decision is contrary to both the prior judge's order granting class certification and to the many other cases in this Circuit where retail-product consumer class actions have been certified in the presence of some degree of uncertainty as to class members' damages. Either the issue is settled law and the district court's ruling is manifestly in error, or the issue is unsettled in the lower courts and it becomes a fundamental issue of law satisfying the second *Chamberlan* factor. Finally, Plaintiff's individual monetary claim is small, far outweighed by the cost of litigation. *See Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir. 2009) ("where the high costs of litigation grossly exceed an individual plaintiff's potential damages, the denial of class certification sounds the death knell of that plaintiff's claims"). "Rule 23(f)'s text and purpose counsel a broad reading of 'death-knell situation.'" *Dalton v. Lee Publ'ns, Inc.*, 625 F.3d 1220, 1222 (9th Cir. 2010) (O'Scannlain, J., dissenting) (citing *Chamberlan*, 402 F.3d at 960).

II. STANDARD OF REVIEW FOR CLASS CERTIFICATION ORDERS

The Court reviews a district court's class-certification decision for an abuse of discretion. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1090-91 (9th Cir. 2010). "While "review of discretionary class certification decisions is deferential, it is also true that [the Court] accord[s] the decisions of district courts no deference when reviewing their determinations of questions of law." *Id.* at 1091.

III. THIS CASE SATISFIES RULE 23, AND THE DECERTIFICATION ORDER CORRECTLY REJECTED MOST OF DEFENDANT'S ARGUMENTS FOR DECERTIFICATION

The district court, before reassignment, ruled correctly that the class satisfies Rule 23's predominance requirement. ER251-56. The decertification order was based an incorrect legal holdings on measures of damages and the type of restitution available under California law.

A. Common Questions Predominate

"The Rule 23(b)(3) predominance inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). If "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then those issues predominate over individual questions. *Id.*

The district court previously found that "[a]ll of the Plaintiffs' claims depend on the common issue of whether Cobra's labeling is false or misleading," and that the "evidence relevant to this inquiry is also common to all claims: it is the packaging itself." ER252. Neither of these factors has changed, and the district court, in decertifying the class, made no finding that these factors have changed. The court's initial holding that "Defendant's arguments that individual questions predominate are unavailing," ER253, still holds true. The class, as before, satisfies the Ninth Circuit's criteria for predominance.

B. The District Court's Order Decertifying the Class Disregarded Ninth Circuit Authority Regarding Damages and Predominance

Uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages. *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013) (applying *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1435 (2013)); *see also Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975); *Yokoyama*, 594 F.3d at 1094; *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 986-88 (9th Cir. 2015). In *Leyva*, a wage-and-hour class action, this Court held that the predominance requirement is satisfied if the plaintiff is "able to show that [class] damages stemmed from the defendant's actions that created the legal liability." 716 F.3d at 514. This is exactly the case here. Defendant sold the same bogus and illegal "aphrodisiac" to every class member, each of whom is

entitled to damages and restitution under California's consumer protection laws.

The district court attempted to distinguish *Leyva* on the basis that the plaintiffs in that action "had a workable damages model that matched their theory of liability." ER28. But that is exactly what the district court also found in *this* action—that the Plaintiff had provided an appropriate damages model that matched the theory of liability. ER25 ("The Court finds that Plaintiff's full refund damages model matches his theories of liability.")

The district court here, however, de-certified the Class on the sole basis that there was as yet, according to the court, incomplete evidence in the record regarding retail prices paid by class members. ER25-29. This both gets the record wrong and is wholly inconsistent with Ninth Circuit authority, that uncertainty in damages calculations does not call into question predominance for class certification purposes. *See Leyva*, 716 F.3d at 514.

At the class certification stage, a plaintiff need only show that the proposed method for calculating damages is plausible. *See, e.g., Menagerie Prods. v. Citysearch*, 2009 U.S. Dist. LEXIS 108768, *62-66 (C.D. Cal. Nov. 9, 2009) (certifying the class over defendants' objection that the method of calculating damages was imprecise); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 494 (C.D. Cal. 2006) ("Moreover, 'in assessing whether to certify a class, the Court's inquiry is limited to whether or not the proposed methods for computing damages are so insubstantial as to amount to no method at all . . . . Plaintiffs need only come forward with plausible [method]'" (quoting *Klay v.*

Humana, Inc., 382 F.3d 1241, 1259 (11th Cir. 2004); *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 554 (N.D. Cal. 2005))). The district court's observation that Plaintiff's retail price data was not complete was therefore insufficient justification to decertify the class. *See Johns v. Bayer Corp.*, 280 F.R.D. 551, 557-58 (S.D. Cal. 2012) (applying *Yokoyama* to certify a similar class challenging vitamin advertising). In the instant case, as in *Leyva*, the "district court applied the wrong legal standard by concluding that individual questions predominate over common questions." *Leyva*, 716 F.3d at 513.

None of the cases the district court cited in support of decertification provide binding or persuasive authority for decertification. Despite ample and binding authority from this Court, the district court relied on, for example, *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 135-36 (S.D.N.Y. 2006); ER29. *Freeland* was an antitrust action unsuitable for class treatment because, *inter alia*, the class representative did not have standing, the plaintiff had no method of determining which class members suffered injury, and, likely influential in the court's decision, the *Freeland* court found it would have to hold 100 million individual hearings, one for each AT&T customer, before it could rule on injunctive relief. *Freeland*, 238 F.R.D. at 157.

Caldera v. J.M. Smucker Co., 2014 U.S. Dist. LEXIS 53912 (C.D. Cal. Apr. 15, 2014), cited at ER27, is also easily distinguishable because the plaintiff's damages model in that false-labeling snack food case required a "true value" of the product—not required here—so the defendant's sales data alone were not sufficient. *Caldera*, 2014 U.S. Dist. LEXIS 53912 at *11-12. Thus,

even though the health claims on defendant's frozen peanut butter and jelly sandwiches were false, the *Caldera* court found the products still had *some* value to consumers. A premium between the mislabeled product and the value received therefore needed to be calculated and the plaintiff failed to present a model for doing so. *Id.*

Plaintiff here, by contrast, alleges and provides evidence that (1) the product is wholly ineffective, (2) the product is dangerous, and (3) the product is illegal. For these reasons, no "true value" calculation is needed: all the revenue Nutraceutical received from the sale of Cobra was fraudulently obtained with no off-setting value, unlike a food product with overstated health claims, which can still be consumed and enjoyed. *Caldera* is therefore inapplicable.

Astiana v. Ben & Jerry's Homemade, Inc., 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014), also cited by the court, is similar. ER26. In that case, the district court found that the plaintiff needed to provide pricing information for competing ice creams that did not have deceptive labels in order to calculate "price premium" damages, but the plaintiff there had not and could not supply such data. Here, the plaintiff is not proposing a comparison method of damages between Cobra and other fraudulent aphrodisiacs, but proposing and providing evidence that the value of Cobra is nothing, and the Class should receive full restitution. Thus, *Astiana* is also inapposite.

Moreover, while fully distinguishable, *Caldera* and *Astiana* were also wrongly decided because they misapplied the law of restitution. Restitution starts with the restoration to a plaintiff of the funds the

defendant wrongfully acquired. As an equitable remedy, it is subject to equitable defenses, including the partial defense of offset. Thus, a sushi chef who innocently sells albacore as more expensive blue fin tuna may show that it was an innocent error stemming from a mistake by his supplier, and that he promptly corrected his error upon discovering it, and therefore the restitution award of the funds he acquired in selling fish mislabeled as "blue fin" should be reduced by the value of the albacore he provided. This Court explained these concepts with another analogy:

> we return to the hypothetical dishonest rhinestone merchant. Customers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back. We would not limit their recovery to the difference between what they paid and a fair price for rhinestones. The seller's misrepresentations tainted the customers' purchasing decisions. If they had been told the truth, perhaps they would not have bought rhinestones at all or only some. The district court implied this notion of a tainted purchasing decision with its qualification 'given the misrepresentations recommended by [defendant] and made by distributors to consumers.' The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds.

FTC v. Figgie Int'l, 994 F.2d 595, 606 (9th Cir. 1993). In other words, while an innocent mistake might mean a defendant should pay only the difference between what he promised and what he delivered, a "dishonest

merchant" must pay "full refunds," not offset by "a fair price for rhinestones." If they proved a long-standing fraud by a large and sophisticated food manufacturer, as the plaintiffs in *Caldera* and *Astiana* proposed, they foreclosed the equitable defense of offset by showing such defendants lack the clean hands required to assert off-set, no different than the "hypothetical dishonest rhinestone merchant" discussed by this Court. *Compare Caldera*, 2014 U.S. Dist. LEXIS 53912 at *10-12.

Nor is *Marlo v. U.P.S.* on point here, as the Court was primarily concerned there "about the class-wide applicability of the evidence regarding employee misclassification." 639 F.3d 942, 945-47 (9th Cir. 2011).

Plaintiff here has already obtained sufficient price information to enable the jury to estimate damages. *See* Section VI-VIII, below. But even if the damages calculation were uncertain, this is no basis for decertification. *Leyva,* 716 F. 3d at 514. The district court's determination that the "absence of an average retail price makes it impossible to calculate damages either classwide or on an individual basis," was thus a manifest error of law. Moreover, to calculate damages "California law 'requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation . . . [T]he fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery.'" *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (internal citation omitted).

The district court's decision to decertify the class was premised on the legal error that class members' damages must be amenable to precise calculation. The district court erroneously ruled damages could not be approximated by the jury using MSRP or testimony on prices from Plaintiff and retailers, nor could it be deduced from the uncontroverted evidence of wholesale prices Nutraceutical provided. It therefore committed "a per se abuse of discretion" and should be reversed. *Yokoyama*, 594 F.3d at 1091. "So long as the plaintiffs were harmed by the same conduct, disparities in how or by how much they were harmed did not defeat class certification." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014).

C. Other Circuits Are In Accord That Uncertainties in Damages Calculations Does Not Defeat Class Certification

Other circuits agree that individualized damages issues do not defeat predominance or class certification. In the antitrust case *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21 (1st Cir. 2015) the First Circuit held:

> it is well-established that "[t]he individuation of damages in consumer class actions is rarely determinative under Rule 23(b)(3). Where . . . common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." *Smilow*, 323 F.3d at 40; Newberg, supra, § 4:54 (It is a "black letter rule . . . that individual damage calculations generally do not defeat a finding that common issues predominate . . . .")."

In an order vacating the denial of a class certification motion, the Second Circuit affirmed that *Comcast* does not overrule the presumption that "class certification pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure cannot be denied merely because damages have to be ascertained on an individual basis." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402 (2d Cir. 2015). After a detailed discussion of *Comcast*, the Second Circuit concluded "it was well-established . . . that the fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification under Rule 23(b)(3)." *Id.* at 405 (internal quotations omitted).

The Seventh Circuit likewise states:

> the district court misread Rule 23(b)(3) to require a greater showing of common evidence than is contemplated by that rule. Under the district court's approach, Rule 23(b)(3) would require not only common evidence and methodology, but also common results for members of the class. That approach would come very close to requiring common proof of damages for class members, which is not required. To put it another way, the district court asked not for a showing of common questions, but for a showing of common answers to those questions. Rule 23(b)(3) does not impose such a heavy burden.

Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 819 (7th Cir. 2012).

IV. THE ORDER COMMITS ERRORS OF SUBSTANTIVE CALIFORNIA LAW

"Because the class action is a procedural vehicle for the vindication of underlying rights, the damages that each class member is entitled to is ultimately a function of other substantive law." *Vaccarino v. Midland Nat'l Life Ins. Co.*, 2014 U.S. Dist. LEXIS 18601, at *35 (C.D. Cal. Feb. 3, 2014) (citing 28 U.S.C. § 2072 (federal rules of procedure "shall not abridge, enlarge or modify any substantive right")). Thus, calculation of damages and restitution under California statutes, including the aggregated claims of a class, is a matter of California law.

As an initial matter the California Supreme Court is in accord with federal authority that questions regarding determination of damages do not prevent class certification. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1054 (2012). Thus "damages may be computed even if the result reached is an approximation." *GHK Assocs. v. Mayer Group, Inc.*, 224 Cal. App. 3d 856, 873 (1990). Under "California law, plaintiffs are required to, at most, provide ***a reasonable estimate*** of their damages." *Vaccarino*, 2014 U.S. Dist. LEXIS 18601 at *35-36 (emphasis added). The "defendant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision." *Id.* (quoting *Dallman Co. v. S. Heater Co.*, 262 Cal. App. 2d 582, 594 (1968)).

Brinker further describes California law on this issue:

> We have long settled that individual damages questions will rarely if ever stand as a bar to certification. In almost every class action, factual determinations of damages to individual class members must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution.

Brinker, 53 Cal. 4th at 1054 (Werdegar, J., concurring) (internal quotations, alterations, and citations omitted). Moreover, "to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device." *Id.* Any such holding is therefore contrary to California law, whose policy strongly favors the class action device. *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 340 (2004) (California "has a public policy which encourages the use of the class action device." (quoting *Richmond v. Dart Industries, Inc.*, 29 Cal.3d 462, 473 (1981)). Sound the death-knell of retail-product class actions is exactly what the district court would do, as a plaintiff will almost never have exact evidence of the prices charged at retail locations given the reality of constant price changes, sales, and promotions. Plaintiff's presentation of MSRP, the actual prices charged online, examples of actual retail prices, and wholesale prices is sufficient to allow a jury to make a reasonable approximation.

V. CALIFORNIA ALLOWS MULTIPLE METHODS OF RESTITUTION CALCULATION IN CONSUMER CLASS ACTIONS TO FACILITATE ITS PUBLIC POLICY OF FAIR AND HONEST COMPETITION

California law provides that a trial court sitting in equity may order "a defendant, who carefully exploited an unfair trade practice so that the individual victims suffered only minor losses, to disgorge the resulting large and illicit sum of money." *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 452 (1979) (internal citations omitted). And "a court of equity may exercise its full range of powers in order to accomplish complete justice between the parties, restoring if necessary the *status quo ante* as nearly as may be achieved." *Id.* This binding "full range of powers to accomplish complete justice" language means the district court's narrow view rejecting the use of other measures such as MSRP or defendant's wholesale revenue from the sales of Cobra to calculate restitution was in error. On the contrary, the district court had "'very broad' discretion to determine [a restitution] award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff the amount that the defendant wrongfully acquired." *Wiener v. Dannon Co.*, 255 F.R.D. 658, 670-71 (C.D. Cal. 2009) (quoting *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 695 (2006)).

While relying on out-of-circuit cases and those involving dissimilar products, the district court ignored ample local precedent involving "health and nutrition" fraud. In *Delarosa v. Boiron, Inc.*, 275 F.R.D. 582 (C.D.

Cal. 2011), involving an ineffective "natural" cold remedy, the Honorable Josephine S. Tucker explained that under the CLRA, plaintiffs could recover the "[a]mounts actually and reasonably expended in reliance upon the fraud," *id.* at 592 (quoting Cal. Civ. Code § 3343(a)(1)), and that in a false advertising case, "the amount of restitution under the UCL and actual damages under the CLRA is the same," and equivalent to "the amount [plaintiff] spent purchasing packages of" the challenged product. *Id.* Similarly, in *Krueger v. Wyeth, Inc.*, 2011 U.S. Dist. LEXIS 154472 (S.D. Cal. Mar. 29, 2011), the Honorable John A. Houston explained that:

> plaintiff does not seek the difference in price between [defendant's] drugs and a drug issues by another manufacturer. Rather, plaintiff seeks a refund of the entire purchase price . . . . Defendant's argument that nonrestitutionary disgorgement is not an available remedy under the UCL is correct. However, restitutionary disgorgement is allowed under the UCL and that is the remedy sought by plaintiff here.

Id. at *17, *40 n.10. As another example, in *Johns v. Bayer Corp.* restitution was measured by the defendant's profits in selling a vitamin mix with allegedly false claims. 280 F.R.D. 551, 560 (S.D. Cal. 2012).

VI. THE ORDER RESTS ON ERRONEOUS FACTUAL FINDINGS AND INFERENCES

In addition to errors of law, the district court made several critical factual errors, including: (1) misstating the required inputs to Plaintiff's proposed damages

model; (2) incorrectly concluding that Plaintiff did not have sufficient record evidence for a jury to estimate classwide damages; and (3) incorrectly assuming that Plaintiff would be unable to obtain additional price information prior to or at trial, if such evidence were needed.

A. The District Court Incorrectly Assumed that Plaintiff's Damages Model Required Actual Retail Price to Calculate Class Damages

The district court incorrectly cited Plaintiff's proposed damages model as if it depended *exclusively* on an average retail price ("ARP") for the Products. This was not correct. Plaintiff had proposed in his motion for class certification a damages model based principally on the average suggested retail price ("ASRP" or "MSRP"), not solely on the ARP as the district court presumed. ER307-08. Plaintiff proposed using ARP only as an alternative measure of damages. ER308. Plaintiff already has obtained ASRP/MSRP evidence in discovery, so the court's finding that Plaintiff has "no data" for his model is simply incorrect. ER352-53, 357-370 at ¶¶3-8, Exs. 1-6 (filed under seal).

In the decertification order, the court cited Lambert's proposed damages model correctly, but then analyzed it incorrectly. First, it correctly described Plaintiff's model,

> Thus, using the average suggested retail sales price for [Cobra], which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class.

ER25 (citing ER307-08 (emphasis added)). This phrasing was accurate. The model is based on suggested retail prices, not actual. Plaintiff proposed in his successful Motion for Class Certification that,

> [t]he amount spent on Cobra by the class can be established by Defendants' own sales data and **suggested** retail sales prices produced in discovery.
>
> . . . .
>
> Thus, using the average **suggested** retail sales price for the Product ("**MSRP**"), which can also be obtained in discovery, multiplied by the number of units sold, will establish total amount of restitution dollars owing to the class. *See id.* **In the alternative**, the out-of-pocket dollars spent by the class on the Product can be acquired by Plaintiffs from companies that collect point-of-sale information, such as Spins.

ER307-08 (emphases added.).

Unfortunately, the district court then proceeded to analyze the damages model as if it was based instead only on the ARP, not the ASRP/MSRP as Plaintiff proposed and as the court initially approved. The district court failed to note that Lambert already had obtained in discovery sufficient data on suggested retail prices to calculate damages using the proposed model.

The court, therefore, erroneously concluded, referring to ARP, that: "In the instant case, there simply is no evidence to calculate damages under Plaintiff's damages model is what stops the analysis." [sic] ER28.

This was a manifest error of fact, per the district court's own recitation of Lambert's model which uses ASRP/MSRP, not ARP data.[2] All that Lambert needs to calculate damages under this model is Nutraceutical's ASRP/MSRP and unit sales, both of which he already has. *See* ER352-53, 357-370 at ¶¶3-8, Exs. 1-6 (filed under seal). Thus, Plaintiff already has a validated model and sufficient data to calculate proposed class damages using that model. The district court erred when it found otherwise.

Further, any suggestion that Plaintiff promised to supply pricing data through "expert accountant testimony" or "independent, third parties that gather point-of-sale data" is incorrect. Plaintiff merely offered these as possible examples of calculating damages. However the district court, even when presented with (1) evidence of actual retail prices, (2) the suggested retail price, and (3) the defendant's aggregate revenue, found that none of these methods could be used as a measure of damages or restitution and that the class must be de-certified as a result.

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[2] Plaintiff had proposed using principally the ASRP/MSRP, with ARP only as a backup method of calculating class damages. The court's 2014 Order certifying the Class used the phrase, "average retail price" without clarifying whether the court meant the "average suggested retail price" (ASRP/MSRP), the "average actual retail price" (ARP), or both. Plaintiff consistently proposed the average suggested retail price (ASRP/MSRP) as the primary measure of damages, *see* ER307; ER261 ¶¶ 27-28, and that is the formula the court recited in the February 20, 2015 Order. ER19-29.

B. Plaintiff Presented Sufficient Retail Pricing Data

The district court found as a matter of law that "without the average retail price, class wide damages cannot be calculated." ER27. This is a misstatement of California law governing damages for consumer fraud. It is further wrong because Plaintiff did have representative data even if it did not cover every sale.

VII. CONTRARY TO THE DISTRICT COURT'S FINDING, PLAINTIFF HAS RETAIL PRICE DATA

Plaintiff already has some retail price data from deposition testimony and from Defendant's direct website sales to consumers. *See* ER352-53, 357-370 at ¶¶3-8, Exs. 1-6 (filed under seal). He further has Nutraceutical's suggested retail prices. *See, e.g., Brinker,* 53 Cal. 4th at 1054. (Courts must "use [ ] a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts.") While Nutraceutical should be free to attack these sources of evidence of damages at trial, for example by showing that some retailers sold the product for less than MSRP, this is a purely factual issue for a jury to decide at trial, not by the Court on a decertification motion. *See McCrary*, 2014 U.S. Dist. LEXIS 8443, at *50 (holding that even if damages need to be recalculated at trial, such a "reduction in allowable damages . . . is not fatal to class certification.").

VIII. PLAINTIFF CAN ADDUCE ADDITIONAL RETAIL PRICE INFORMATION AT TRIAL

Plaintiff can also develop additional proof of damages at trial, through testimony of class members, adverse witnesses, or representative retailers. Justice Werdegar has specifically recommended representative testimony at trial "to [facilitate] determinations of the extent of liability" when damages may be uncertain. *Brinker*, 53 Cal. 4th at 1054. For the district court to assume that no additional price data could possibly be admitted into evidence at trial was error.

Through the data already available, as well as through sales testimony admissible at trial, Plaintiff can present satisfactory information for a jury to reliably estimate damages without "undue speculation." *Cf.* Order Denying Plaintiff's Motion for Reconsideration, ER 14-15 n.8; *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (the law "requires only that damages be capable of measurement based upon reliable factors without undue speculation.") It was therefore error for the district court to take this factual decision away from the jury prematurely by decertifying the Class.

IX. THE DISTRICT COURT'S REFUSAL TO PERMIT THE INTRODUCTION OF WHOLESALE PRICE DATA FOR DAMAGES IS CONTRARY TO CALIFORNIA LAW

Plaintiff, in moving for summary judgment while the Class was still certified, provided a model for class calculation of damages, that, unlike retail prices for which perfect records do not exist, is beyond dispute:

the actual wholesale revenue received by Defendant from the sale of Cobra during the class period. *See* ER201-02. Even assuming, *arguendo*, that aggregated damages have to be calculated perfectly under California consumer law, and Lambert lacked evidence to do so, the revenue data was obtained directly from Defendant and is perfectly precise. Indeed, Plaintiff's motion for summary judgment, never decided by the district court, provided a restitution calculation down to the penny: $176,999.28 in restitution and $34,951.16 in prejudgment interest. *See* ER173-74.

The district court rejected the use of the lower but perfectly precise wholesale data as an alternative to the higher, but less precise retail data:

> Using the sales data alone, Plaintiff seeks to disgorge Defendant of what Defendant received from its wholesale sales, but as previously mentioned, Plaintiff and his class members do not have an ownership interest in those sales.

ER15. But if a Plaintiff can prove he was defrauded by being sold a worthless and dangerous unapproved drug, and inarguably has an ownership interest in the full retail price he paid for the product, he must also have an ownership interest in at a minimum the lessor amount represented by the wholesale price. The wholesale price of the product, known here, provides at a minimum a valid starting point for the calculation of restitution under California law. The decertification order is thus based on a misstatement of California law, which grants a court wide discretion to decide the appropriate method of the calculation of restitution. The order further fails as a matter of logic: if Plaintiff was defrauded of $20 from the sale of "Cobra Sexual

Energy" at a store, and the $20 represents funds in which the Plaintiff has an ownership interest, how could the amount the Defendant acquired from Plaintiff, as evidenced by the wholesale price of $10, not also be funds in which the plaintiff enjoys an "ownership interest?"

The district court also erred in disregarding long-standing precedent in favor of effecting restitutionary damages. California law authorizes a trial court to order a defendant simply to disgorge the money defendant gained by defrauding a class. *See Guido v. L'Oreal, USA, Inc.*, 2013 U.S. Dist. LEXIS 94031, at *37 (C.D. Cal. July 1, 2013). A court of equity may exercise its powers to effect justice, *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 452 (1979), and

> with respect to the restitution permitted under the CLRA and UCL, the Court has 'very broad' discretion to determine an appropriate remedy award as long as it is supported by the evidence and is consistent with the purpose of restoring to the plaintiff ***the amount that the defendant wrongfully acquired.***

Wiener v. Dannon Co., 255 F.R.D. 658, 670 (C.D. Cal. 2009) (emphasis added). *See also* Restatement (Third) of Restitution and Unjust Enrichment § 44 cmt. a (2011) ("Restitution by this rule will sometimes yield a recovery where a claimant could not prove damages . . . .")

The Sixth Circuit is in accord and also affirmed this principle in *Rikos v. P&G*, 799 F.3d 497 (6th Cir. 2015). *Rikos* involved a probiotic supplement that plaintiffs contended, like here, did not work and was thus

valueless. Applying California law, it affirmed "Plaintiffs' damages model—a full refund of the purchase price for each class member—satisfies *Comcast*," and upheld the lower court's order granting class certification finding "the district court did not abuse its discretion in determining that common issues will predominate over individual issues in resolving the key merits issue of this case—whether [the product works]." *Id.* at 523-24. The lower court, in finding plaintiffs' damages model sufficient for class certification noted "Defendant's liability amount, based either on total retail sales ***or a conservative wholesale sales measure*** . . . can be readily determined." *Rikos v. P&G*, 2014 U.S. Dist. LEXIS 109302, at *46 (S.D. Ohio June 19, 2014) (emphasis added). The court noted that as "a general matter, a wrongdoer cannot escape liability by stating that its records do not permit calculating damages or restitution with exact precision" and concluded that with wholesale sales "the jury may make a just and reasonable estimate of the damage based on relevant data and act upon probable and inferential, as well as direct and positive proof. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Id.* at *46-47 (internal citations and alterations omitted).

CONCLUSION

For the foregoing reasons, order of the district court decertifying the class should, respectfully, be vacated.

Dated: January 27, 2016

Respectfully Submitted,

/s/ Gregory S. Weston

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STATEMENT OF RELATED CASES PURSUANT TO LOCAL APPELLATE RULE 28-2.6

Pursuant to Ninth Circuit Court of Appeal Local Rule 28-2.6, I hereby state there are no cases known to be pending before this Court that are deemed to be related to this action.

DATED: January 27, 2016

THE WESTON FIRM

/s/ Gregory S. Weston
Gregory S. Weston

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

JA 98

Appellate Case No.: 15-56423
Filed February 25, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Troy Lambert, *Plaintiff-Appellant*,
vs.
Nutraceutical Corp., *Defendant-Appellee*.

Appeal from an Order of the United States District Court for the Central District of California, Court Case No. 2:13-cv-5942-AB-(Ex)

ANSWERING BRIEF OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Defendant-Appellee Nutraceutical Corp. states that the parent company of Nutraceutical Corp. is Nutraceutical International Corp. Nutraceutical International Corp. owns 100 percent of Nutraceutical Corp.'s stock.

Dated: February 25, 2016 By: */s/ John C. Hueston*
John C. Hueston

[Table of Contents and Table of Authorities Omitted in Printing of this Appendix.]

I. STATEMENT OF JURISDICTION

The district court has jurisdiction over this case under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). There is diversity of citizenship because Plaintiff-Appellant Troy Lambert is a citizen of California, while Defendant-Appellee Nutraceutical Corp. ("Nutraceutical") is incorporated in Delaware. Lambert alleges that aggregate claims of the class exceed $5,000,000.00, exclusive of interest or costs.

The district court decertified the class on February 20, 2015. ER19-29. Lambert filed a motion for reconsideration on March 12, 2015. ER103-29. The district court denied Lambert's motion on June 24, 2015. ER 1-18. Lambert filed a petition for permission to appeal the decertification order to this Court on July 8, 2015. Supplemental Excerpts of Record ("SER") 003-07.

Rule 23(f) of the Federal Rules of Civil Procedure governs interlocutory appeals of "order[s] granting or denying class-action certification." Fed. R. Civ. P. 23(f). The Rule requires that a petition for permission to appeal be filed "within 14 days after the order is entered." *Id.* Lambert does not deny that he failed to file his petition within 14 days of the court's decertification order. Rather, he claims his petition is timely because it was filed within 14 days of the court's denial of his motion for reconsideration.

On September 16, 2015, this Court granted Lambert's petition for permission to appeal the district court's February 20, 2015 decertification order and the June 24, 2015 order denying his motion for reconsideration of the decertification order. SER001-02.

In its order, this Court ***specifically ordered*** the parties to "address the timeliness" of Lambert's Rule 23(f) petition, and cited *Briggs v. Merck Sharp & Dohme*, Nos. 15-55873, 15-55874, 15-55876, 15-55877, 2015 WL 4645605, *5-6 (9th Cir. August 6, 2015), for the proposition that "after the petitions for permission to appeal were granted, the merits panel considered the timeliness of the petitions." *Id.*

II. QUESTION PRESENTED

Under Rule 23(f) of the Federal Rules of Civil Procedure, a party must file a petition seeking permission to appeal an order granting or denying class-action status within 14 days of that order's entry. Plaintiff-Appellant Troy Lambert filed his Rule 23(f) petition *more than four months* after the district court entered its decertification order. Was Lambert's Rule 23(f) petition time-barred by the Federal Rules of Civil Procedure, and should his appeal be denied on that ground?

III. STATEMENT OF THE CASE

On August 14, 2013, Plaintiff-Appellant Troy Lambert, along with his former co-lead plaintiff Frank Ortega (who was previously dismissed with prejudice after he was caught lying under oath), filed the underlying suit against Nutraceutical, alleging violations of California's false advertising and unfair competition laws related to his purchases of Cobra Sexual Energy ("Cobra"), a dietary supplement comprised of herbs, extracts, and other plant-based materials. Lambert sought to represent a class of all persons who had previously purchased Cobra in California.

Relying on a number of Lambert's representations about what he would be able to prove in discovery, the district court certified the class on July 14, 2014. ER243-259. For example, in his motion for class certification, Lambert promised to "use expert testimony, such as a consumer survey expert" to establish class commonality. SER023 (Def.'s Mot. to Decert. Class). Yet he never retained a single expert. Similarly, Lambert promised he would prove his sole damages theory by using "an average retail price." ER255. Yet after months of opportunity during discovery, he failed to obtain any evidence whatsoever of Cobra's average retail price. ER029.

Following the close of discovery, and in light of Lambert's continued failures to establish class commonality and provide an average retail price, Nutraceutical moved to decertify the class. The district court granted class decertification on February 20, 2015, on the grounds that Lambert could not demonstrate a class-wide calculation of damages. ER019-29.

Following decertification of the class, at a March 2, 2015 status conference, Lambert requested permission from the district court to file a "renewed motion for class certification." SER011-12 (Stat. Conf. Tr.). The court denied his request. SER014. Lambert then moved for reconsideration on March 12, 2015—20 days after the class was decertified. ER103-30. The district court denied his motion for reconsideration on June 24, 2015, finding that he had failed to identify "any new evidence or law" that could not have been previously presented to the court, or any clear or manifest error. ER017. Lambert then filed a Rule 23(f) petition seeking

permission to file an interlocutory appeal of the district court's decertification order on July 8, 2015—*more than four months* after entry of the decertification order. SER003-07.

On September 16, 2015, this Court granted Lambert's Rule 23(f) petition, specifically ordering the parties to "address the timeliness" of Lambert's Rule 23(f) petition. In doing so, this Court cited *Briggs v. Merck Sharp & Dohme*, Nos. 15- 55873, 15-55874, 15-55876, 15-55877, 2015 WL 4645605, *5-6 (9th Cir. August 6, 2015), for the proposition that "after the petitions for permission to appeal were granted, the merits panel considered the timeliness of the petitions." SER001-02.

IV. SUMMARY OF ARGUMENT

The Rule 23(f) petition underlying this appeal is time-barred by the Federal Rules of Civil Procedure, and the appeal should be denied for that reason alone. Rule 23(f) of the Federal Rules of Civil Procedure, which governs interlocutory appeals from "order[s] granting or denying class-action certification," provides 14 days after the order is entered to file a petition to this Court for permission to appeal, and there is no doubt that Lambert missed this deadline.

Every circuit to consider the issue agrees that this time limit is strict and unyielding, and bars any 23(f) petition not filed within the prescribed time period. Tellingly, despite the fact that this Court's order granting the 23(f) petition specifically directed the parties to "address the timeliness" of the petition, Lambert's opening brief virtually ignores this

dispositive issue. Indeed, Lambert fails to even name it as a question presented. *See* App. Br. 2-3.

Instead, Lambert makes two perfunctory arguments for timeliness, each of which should be rejected: (1) that the district court's denial of his motion for reconsideration opened a new window for filing a Rule 23(f) petition; and (2) that his motion for reconsideration tolled the time period in which to file a Rule 23(f) petition. While Lambert correctly notes that this Court has not yet addressed either issue: whether denial of a motion for reconsideration opens a new window for filing a Rule 23(f) petition, and whether filing a motion for reconsideration tolls the Rule's time limit, he fails to mention that ***six other U.S. Courts of Appeals*** have, and that ***every single one*** would deny his petition as untimely. Moreover, Lambert is unable to cite a single case that supports his misguided arguments.

First, as every circuit to consider the question has held, an order that leaves class-action status unchanged from a prior court order is not an order granting or denying class certification under Rule 23(f), and cannot open a new window for filing a Rule 23(f) petition. The logic behind these holdings is clear and compelling: If a petitioner were able to style his motion for reconsideration as a motion for certification under the Rules, then the 14-day time limit prescribed by Rule 23(f) would have no effect. In the interest of judicial economy—and recognizing the disruption an interlocutory appeal brings to the underlying case—the Rules grant just one chance to file a Rule 23(f) petition: within 14-days of an order granting or denying certification.

Second, though some circuits have held that a properly filed and timely motion for reconsideration will toll the time for filing a petition under Rule 23(f), this narrow exception does not apply here because Lambert's petition ***was not timely filed***. The other circuits are clear and correct: What matters for timeliness is the 14-day window opened by entry of an order granting or denying certification. Here, Lambert did not file his motion for reconsideration until *20 days* after entry of the decertification order. Whether his motion was timely for purposes of the district court's own schedule is irrelevant; rather, "[i]t is the [14-day] period in Rule 23(f), ***and not any other schedule or time period***, that dictates whether a motion to reconsider will toll Rule 23(f)'s strict time period . . . ." *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 194 (3d Cir. 2008) (emphasis added).

In short, Lambert had until March 6, 2015 to file his Rule 23(f) petition under the Federal Rules of Civil Procedure, but chose not to. The fact that he finally filed his petition after the court denied his motion for reconsideration—an order that merely reaffirmed the court's earlier decertification of the class—is immaterial. The fact that he filed his motion for reconsideration 20 days after entry of the decertification order is also immaterial. His motion was filed too late to have any effect on the closing of his window of opportunity. That window closed on March 6, 2015 and has not reopened since. Lambert's Rule 23(f) petition is time-barred and his appeal should be denied.

Furthermore, even if his petition were timely—and it is not—Lambert cannot show that the district court

abused its discretion in decertifying the class. Lambert's arguments that the court made legal and factual errors rest on a fundamental misapprehension of the district court's orders and omit crucial information. For instance, the district court held that Lambert had waived argument concerning a second damages model, which he failed to brief in his opposition to the decertification motion and failed to raise during oral argument. Lambert conspicuously fails to mention the district court's holding regarding this waiver in his opening brief. Nor does he offer any argument or cite any caselaw demonstrating why the district court's holding should be overturned.

Likewise, Lambert argues that the district court made factual errors by failing to consider certain evidence he presented to support his damages theory. But the court held that this evidence was waived for the same reason as Lambert's second damages theory: He failed to present the evidence in his briefing papers or during argument. What's worse, Lambert attempts to use this waived evidence to support the damages theory that the court *also deemed waived*. Again, Lambert fails to mention any of this crucial information in his brief.

With regard to the single damages theory that is permissibly raised, Lambert continually misapprehends or misrepresents the district court's holding. While he claims the court erred by requiring precise damages calculations for class individuals, the district court held no such thing. In fact, the court recognized that damages calculations do *not* need to be "exact or 'mathematically precise.'" ER014 n.8. A damages theory *does* have to be workable, however,

and Lambert failed to present any evidence "to calculate damages under [his] damages model" either class-wide or individually. ER028. The district court decertified the class because Lambert failed to propose a damages theory that could work at all, not because it was less than perfectly precise.

In sum, Lambert's appeal should be denied because the Rule 23(f) petition underlying it is time-barred by the Federal Rules of Civil Procedure. This Court should join the holdings of the Third, Fourth, Fifth, Tenth, Eleventh and District of Columbia circuits, and bar Lambert's Rule 23(f) petition as untimely. But even if the petition were timely filed, the appeal should still be denied because Lambert failed to show that the district court abused its discretion in decertifying the class.

V. ARGUMENT

A. Lambert's Untimely Rule 23(f) Petition is Fatal to His Appeal

Lambert's Rule 23(f) petition is time-barred, and this Court should deny his appeal for that reason alone. The Federal Rules of Civil Procedure grant parties 14 days to file a Rule 23(f) petition after entry of an order granting or denying class-action certification. Fed. R. Civ. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered."). The Rule's time limit is strict and unyielding. Indeed, this Court has stated it can consider a petition "only if" it was filed within the prescribed 14-day window. *Plata v. Davis*, 329 F.3d 1101, 1107 (9th Cir. 2003); *see also Fleischman v.*

Albany Med. Ctr., 639 F.3d 28, 31 (2d Cir. 2011) (the "fourteen day filing requirement is a rigid and inflexible restriction") (citation omitted); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (characterizing the time limit as "clearly strict and mandatory"); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190 n.1 (10th Cir. 2006) (timeliness requirement is "mandatory").

Here, the district court entered its decertification order on February 20, 2015. Under the Rule, Lambert had until March 6, 2015 to file his petition. Instead, he did not file until July 8, 2015—more than four months after the window for filing had closed. The untimeliness of Lambert's Rule 23(f) petition is dispositive: His appeal fails because his petition for interlocutory relief is time-barred by Rule 23(f).

In his opening brief, Lambert relegates his timeliness argument to just one sentence and one footnote, even though this Court specifically directed the parties to brief this crucial issue. *See* App. Br. 11 n.1. Lambert's perfunctory argument for timeliness is (1) that the district court's order denying his motion for reconsideration opened a new 14-day window for filing the petition, and (2) that by filing his motion for reconsideration he tolled the 14-day time period until the district court entered its order denying reconsideration. Both arguments fail.

First, as every circuit to address the issue has agreed, an order that leaves class-action status unchanged from what was determined by a prior order is *not* an order granting or denying class-action certification under Rule 23(f), and its entry does *not* open a new 14-day window for filing a Rule 23(f)

petition. *See, e.g.*, *Gutierrez*, 523 F.3d at 193. Thus, the district court's entry of its order denying Lambert's motion for reconsideration—which only reaffirmed the court's earlier decertification order—did not create a new opportunity for filing the petition.

Second, Lambert's motion for reconsideration did not toll the time for filing a Rule 23(f) petition because he filed the motion more than 14 days after the court entered its decertification order. While other courts of appeal have held that filing a "timely and proper motion for reconsideration" may toll the time limit imposed by Rule 23(f), this "narrow exception" only applies to motions filed "within the [14-day] period set forth in Rule 23(f)." *Gutierrez*, 523 F.3d at 193. Lambert filed his motion 20 days after the court decertified the class.

Thus, the only meaningful date by which to measure timeliness is February 20, 2015, the date the district court entered its decertification order. That order opened a 14-day window during which time Lambert had opportunity but chose not to file a Rule 23(f) petition. That window closed on March 6, 2015, and nothing Lambert has done since can reopen it.

1. The District Court's Order Denying Lambert's Motion for Reconsideration Did Not Open a New Window for Filing a Rule 23(f) Petition.

The district court's order denying Lambert's motion for reconsideration did not open a new 14-day window for filing a Rule 23(f) petition because the order merely reaffirmed the status quo. As every circuit to consider

the question has agreed, "[A]n order that leaves class-action status unchanged from what was determined by a prior order is not an 'order granting or denying class action certification,'" and thus does not trigger a new time period for filing under Rule 23(f). *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006) (quoting Fed. R. Civ. P. 23(f)); *see also Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) (same); *in re DC Water and Sewer Auth.*, 561 F.3d 494, 496 (D.C. Cir. 2009) (same); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193 (3d Cir. 2008) (same); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1291-92 (11 Cir. 2007) ("[W]hat counts is the original order denying or granting class decertification, not a later order that maintains the status quo."); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (same).

Lambert argues that Rule 23(f)'s "language of 'an order granting or denying class certification'" should apply to the court's order denying reconsideration because his motion "sought certification of a decertified class . . . ." App. Br. 11 n.1 (quoting *Gutierrez*, 523 F.3d at 193). Incredibly, *Gutierrez*, the one case Lambert cites in support of his argument, directly and unequivocally refutes his position.

As in this case, the petitioner in *Gutierrez* did not argue that his Rule 23(f) petition was timely in relation to the court's original order denying certification; rather, he claimed that the court's denial of his motion for reconsideration opened a new 14-day window for filing under Rule 23(f). The Third Circuit rejected this argument and held that, because the district court's denial of the motion for reconsideration "did not change the status quo," but "merely affirmed [the] decision not

to certify the class," it did "not qualify as an order 'granting or denying class action certification' within the meaning of Rule 23(f)," and thus did not create a new opportunity for filing a Rule 23(f) petition. *Id.* at 194 (quoting Fed. R. Civ. P. 23(f)).

Here, Lambert relies on the same faulty reasoning as the *Gutierrez* petitioner and argues that, because his motion for reconsideration sought recertification of the class, its denial should be subject to a Rule 23(f) petition. App. Br. 11 n.1. But—just as in *Gutierrez*—the district court's denial of Lambert's motion for reconsideration "did not change the status quo." It simply affirmed the court's earlier order decertifying the class. Thus, *Gutierrez*'s holding should apply just as forcefully in this case.

The logic behind *Gutierrez*'s reasoning is compelling. As the Seventh Circuit correctly recognized, if a petitioner were allowed to "styl[e] [his] motion to reconsider as a motion to [re]certify the class," he would be able effectively to "defeat the function of the [14-day] line drawn in Rule 23(f)." *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999). That function "promote[s] judicial economy," by providing only a single window of opportunity to seek interlocutory review." *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1290 (11 Cir. 2007). Courts are right to be wary of parties that seek to subvert the Rule's framework. *See Carpenter v. Boeing Co.*, 456 F.3d 1183, 1190 (10th Cir. 2006) ("Accepting an appeal from such a decision [leaving] the class definition is place would abandon the time limit for all practical purposes. That step would be both unauthorized and imprudent.") (brackets, quotation marks, and citation omitted).

Indeed, Lambert attempted such a subversion here: At a status conference following class decertification, the district court expressly denied Lambert's request to treat his then-forthcoming motion for reconsideration as a "renewed motion for class certification under Rule 23." ER004 n.1.

Litigants cannot be allowed to undermine the Rule's legitimate concerns regarding judicial economy and the disruptive nature of interlocutory appeals by continually seeking recertification of the class, waiting for the court to deny their motion, and then filing a Rule 23(f) petition in this Court. The Rule is clear: *It* sets the time for filing a petition, not litigants.

This Court should join the Third, Fourth, Fifth, Tenth, Eleventh, and D.C. Circuits in explicitly holding that where a district court's order does not change the status quo and merely affirms the court's prior order, it does not create a new opportunity for filing a Rule 23(f) petition. The fact that Lambert filed his petition within 14 days of the district court's order denying his motion for reconsideration is immaterial because that order left the "class-action status unchanged from what was determined" by the court's earlier decertification order. *See Gutierrez*, 523 F.3d. at 193.

2. Lambert's Motion for Reconsideration Did Not Toll the Time for Filing a Rule 23(f) Petition.

Lambert's motion for reconsideration did ***not*** toll the time period for filing a Rule 23(f) petition. While other courts of appeal have held that filing a "*timely* and proper motion for reconsideration" tolls the time limit imposed by Rule 23(f), this "narrow exception" is

inapplicable here. *See Gutierrez*, 523 F.3d at 193 (emphasis added). For a motion to be "timely" for purposes of tolling the Rule 23(f) time limit, it must be filed within 14 days of the order granting or denying certification. *Id.* ("We stress that, for purposes of tolling the time within which to file a Rule 23(f) petition, a 'timely' motion to reconsider is one that is filed within the [14-day] period set forth in Rule 23(f)."); *see also Gary v. Sheahan*, 188 F.3d 891, 892 ("[I]f the request for reconsideration is filed more than [14 days] after the order 'granting or denying class action certification under [Rule 23(f)],' then appeal must wait until the final judgment.") (quoting Fed. R. Civ. P. 23(f)). Here, Lambert filed his motion for reconsideration on March 12, 2015—*20 days* after the district court entered its order decertifying the class. Thus, the motion failed to toll the time limit prescribed by Rule 23(f), and the window for filing this petition closed on March 6, 2015—125 days before the petition was actually filed.

Remarkably, Lambert relies on *Gutierrez* to argue that his motion for reconsideration tolled the time period for filing. *See* App. Br. 11 n.1. But *Gutierrez* clearly held (1) that only a *timely* motion for reconsideration could toll the time period for filing a Rule 23(f) petition, and (2) that, for purposes of tolling, a motion is only timely if it was filed within the 14-day period set forth in the Rule. *Gutierrez*, 523 F.3d at 193. Lambert neglects to mention this critical and dispositive distinction. Instead, he indirectly argues that his motion was timely because the "district court explicitly granted leave to file and set a schedule for a motion to reconsider at its post-decertification scheduling conference." App. Br. 11 n.1 (citing ER131). But *Gutierrez*—again, the only case Lambert relies

on—***unequivocally forecloses this argument***. "[T]he fact that the [reconsideration] motion was timely for the purposes of the District Court's schedule does not necessarily make it timely for an appeal to this [Circuit] Court." *Gutierrez*, 523 F.3d at 194. Rather, "[i]t is the [14-day] period in Rule 23(f), *and not any other schedule or time period*, that dictates whether a motion to reconsider will toll Rule 23(f)'s strict time period . . . ." *Id.* (emphasis added). In other words, whether or not Lambert filed his motion for reconsideration by the date set by the district court is irrelevant under Rule 23(f). All that matters is whether the motion was filed within 14 days of the order decertifying the class. It was not, and Lambert does not—and cannot—dispute this.

In short, Lambert's window for filing a Rule 23(f) petition closed on March 6, 2015—20 days after the district court entered its order decertifying the class. His petition, filed more than four months late, is time-barred by the Federal Rules of Civil Procedure, and his appeal should be denied for that reason alone. Lambert *cannot cite one case* in support of his two arguments for timeliness. Indeed, the one case he does cite unequivocally refutes Lambert and supports Nutraceutical's arguments for *un*timeliness. This Court should join the other circuits in holding that the Federal Rules of Civil Procedure alone determine whether a motion for reconsideration is "timely" for Rule 23(f) purposes.

B. Even If Lambert's Rule 23(f) Petition Were Timely, He Cannot Show that the District Court Abused Its Discretion in Decertifying the Class

The district court decertified the class in this action because Lambert failed to "demonstrate that damages [were] measureable on a classwide basis through use of a 'common methodology'" as required by Supreme Court precedent. ER022-23 (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1526, 1430 (2013)). The court held that Lambert's proposed application of his full-refund theory of damages—the sole damages theory he advanced at the certification and decertification stages—was too speculative to support Rule 23 predominance. *See Comcast*, 133 S. Ct. at 1433.

Lambert argues that the court erred both in its application of law and in its factual findings. Both arguments rely on a fundamental misunderstanding of the court's holdings and omit critical facts.

First, Lambert argues that the district court erred by demanding that "class members' damages must be ...aenable to precise calculation." App. Br. 20. The court ...eld no such thing. In fact, the court recognized that damages calculations do *not* need to be "exact or 'mathematically precise.'" ER014 n.8. A damages theory *does* have to be workable, however. ER028. Here, Lambert failed to present any evidence "to calculate damages under [his] damages model," which, the district court correctly determined, "stop[ped] the analysis." *Id.*

Second, Lambert argues that the district court erred by failing to consider his restitutionary-

disgorgement model for damages. App. Br. 24-25. The district court held that Lambert had waived this argument by failing to brief it in his opposition to the decertification order or to raise it at oral argument. *See* ER008. Lambert does not mention this holding in his opening brief. Nor does Lambert offer any argument—let alone cite any supportive caselaw—that the district court was wrong to consider the argument waived. Additionally, in its order denying reconsideration, the district court correctly held that the same lack of evidence that doomed Lambert's full-refund model likewise doomed his improperly proposed restitutionary-disgorgement model. ER009-016.

Third, Lambert argues that the district court made a factual error by refusing to consider evidence Lambert allegedly offered to support his damages theory. App. Br. 26. Much like his restitutionary-disgorgement model, Lambert failed to present this evidence in his opposition to the motion for decertification, and raised it with the court for the first time in his motion for reconsideration. *See* ER011 ("Plaintiff does not claim that this evidence is newly discovered. Therefore, such evidence should have been presented to the Court in those previous opposition papers, not a motion for reconsideration.") (citing C.D. Cal. L.R. 7-9, 7-18). Moreover, the court correctly determined that this "*newly* presented evidence [was] unreliable" and rendered Lambert's damages model "nonrestitutionary in nature." ER011 (emphasis in original).

1. Standard of Review

"A district court's class certification ruling is reviewed for abuse of discretion." *Pulaski &*

Middleman, LLC v. Google, Inc., 802 F.3d 979, 984 (9th Cir. 2015) (citing *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008)). A district court abuses its discretion "if it (1) relies on an improper factor, (2) omits a substantial factor, or (3) commits a clear error of judgment in weighing the correct mix of factors." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013). This Court "review[s] the district court's findings of fact under the clearly erroneous standard, meaning [it] will reverse them only if they are (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the record." *Id.* (internal quotation marks and citation omitted). An error of law is a "per se abuse of discretion." *Id.*

2. The District Court Correctly Held that Lambert Failed to Offer Sufficient Evidence to Support His Full-Refund Damages Model.

At issue in the court's decertification order was Lambert's full-refund theory of damages—the sole damages theory Lambert advanced at the certification and decertification stages. In order to work, Lambert's model required evidence of the average retail price class members actually paid for Cobra from third-party retailers, because the damages sought "serve[d] to provide what the class members *lost*, not what the Defendant gained." ER026. Though the court recognized that "calculating damages need not be exact or 'mathematically precise,'" it could not consent to Lambert's "speculative approach." ER014 n.8 (citing *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 970 (9th Cir. 2013) (the law "requires only

that damages be capable of measurement based upon reliable factors without *undue speculation*") (emphasis in original)). Lambert's failure to provide an average retail price was a failure to produce the evidence necessary to demonstrate class-wide damages. Thus, he could no longer meet his burden of showing that class certification was warranted. *See Marlo v. United Parcel Serv.*, 639 F.3d 942, 947 (9th Cir. 2011) (burden of proof on a motion for decertification remains with the party advocating for class certification).

Throughout his opening brief, Lambert claims the district court improperly demanded precise figures for class members' individual damages amounts. This mischaracterizes the district court's holding. The Court determined that Lambert's approach to calculating full-refund damages based on Cobra's sales to wholesalers—sales that had no relation to the price customers actually paid for the product—was too speculative to survive *Comcast*:

> In this context, the price Defendant sold Cobra to its wholesalers does not reflect the price class members actually paid. It is the average retail price that reflects the price class members actually paid. . . . Although the average retail price does not have to be exact, it is nevertheless critical at this stage of the litigation. Missing this calculation is a defect in Plaintiff's evidence that is fatal to his class claims because restitution serves to provide what the class members lost, not what the Defendant gained.

ER026.

As the district court made clear, "individualized damage calculations" may not defeat certification so long as the plaintiff has a "*workable* damages model that matche[s] [his] theory of liability." ER028 (distinguishing this case from *Leyva v. Medline Indus. Inc.*, 716 F.3d 510 (9th Cir. 2013)) (emphasis added). In *Leyva*, a class of employees implicated individualized damages because not every member of the class earned the same wage or worked the same number of hours. The court held that, though the damages may not be uniform, class decertification was not required. *Leyva*, 716 F.3d at 514. Critically, though, the *Leyva* plaintiffs had presented a *workable* model that matched their theory of liability. ER028. Here, Lambert's failure to produce an average retail price "ma[de] it impossible to calculate damages either classwide *or* on an individual basis" *Id.* (emphasis added).

Lambert misses the point by arguing that the district court had found that his full-refund model matched his theory of liability. App. Br. 15. The district court did not decertify the class because Lambert failed to provide a damages model that matched his theory of liability. Nor did the district court decertify the class because it incorrectly demanded more precise individual damages calculations. The district court decertified the class because Lambert failed to provide "any evidence to calculate damages" either on a "classwide *or* on an individual basis." ER028. (emphasis added). Lambert's inability "to put forth a damages model that *could calculate damages attributable* to [his] liability theory" doomed class certification. *Werdebaugh v. Blue Diamond Growers*, No. 12-cv-02724, 2015 WL 397751, at *3 (N.D. Cal. Jan. 29, 2015) (decertifying a class based on plaintiffs'

inability to "put forth a damages model that measured the damages attributable to Defendant's wrongful conduct") (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)) (emphasis added); *see also Forrand v. Fed. Express. Corp.*, 2013 WL 1793951, at *3 (C.D. Cal. Apr. 25, 2013) ("As the Supreme Court reemphasized in *Comcast*, in order for Rule 23(b)(3)'s predominance requirement to be satisfied, a plaintiff must bring forth a measurement method that can be applied classwide *and* that ties the plaintiff's legal theory to the impact of the defendant's allegedly illegal conduct.") (emphasis in original).

Lambert's superficial attempts to distinguish the other cases relied on by the district court are equally unavailing. As discussed above, Lambert continually asserts that the district court demanded precise damages calculations from him. It did not. The court merely required—as *Comcast* requires—a *workable* damages theory. Thus, Lambert's reliance on *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) for the proposition that "California law 'requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation" is inapposite. The district court held *the very same thing*. By neglecting to provide an average retail price, Lambert failed to offer a "reasonable basis of computation of damages." *That* is why the district court decertified the class, and *Pulaski* does not contradict that holding.

The other cases Lambert cites are similarly inapposite because they only discuss *precision* of damages calculations, not whether the model itself is

workable at all as required by *Comcast*. *See* App. Br. 16 (citing cases for the propositions that certification is appropriate even where the "method of calculating damages was imprecise," and that plaintiffs need only to present a "plausible method" to the court). The district court did not err in applying *Comcast* to find that Lambert failed to present a workable damages theory. The court's holding was supported by voluminous caselaw, which Lambert failed to rebut. His inability to produce an average retail price was fatal to the class and should be fatal to his appeal.

3. The District Court Correctly Held that Lambert's Restitutionary-Disgorgement Damages Model Also Fails.

(a) Lambert waived any argument related to this model by raising the issue for the first time in his motion for reconsideration.

Lambert argues that the district court erred by failing to consider his restitutionary-disgorgement model of damages. App. Br. 24-26, 31-32. In fact, Lambert waived this argument by failing to raise it both in his opposition to Nutraceutical's decertification motion and during oral argument. *See* ER006 ("In reviewing Plaintiff's opposition to the motion to decertify class, it is abundantly clear that Plaintiff's newfound disgorgement model and arguments in support of that model were well outside the record before the Court."). He cannot now argue that the district court erred by not considering this untimely disclosed model.

In his opening brief, Lambert alludes that this restitutionary-disgorgement model was mentioned in his motion for summary judgment. App. Br. 31. Even if true, Lambert failed to cite his summary judgment papers in opposing Nutraceutical's motion for decertification. *See Fair Housing Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d 1132, 1135-36 (9th Cir. 2001) (noting that a district court is required to review evidence filed in support of another motion so long as that evidence is "specifically identified in [the] moving papers"). As the district court noted, if Lambert wished "to have the court consider evidence cited in a separate motion for summary judgment" he must "actually *cite* the evidence *in [his] opposition papers*." ER 006 (citing *Fair Housing*, 249 F.3d at 1135-36) (emphases in original). "It is unreasonable for Plaintiff to expect the Court to extrapolate this alternative damages model from his Summary Judgment briefing. In effect, Plaintiff seeks to transform the Court into 'lawyer for [Plaintiff], performing the lawyer's duty forth setting forth specific [arguments] . . . .'" ER006 (quoting *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001)) (alterations in original).

Lambert offers no argument that the district court erred in finding this restitutionary-disgorgement model waived. Indeed, he fails to mention the fact at all. By contrast, the district court cited extensively in support of its holding that Lambert's "failure to explicitly raise this newly proposed alternative damages model argument[] in his opposition papers or oral argument amount[s] to a waiver of this argument." ER008 (citing *Moreno Roofing Co., Inc. v. Nagle*, 99 F.3d 340, 343 (9th Cir. 1996) (passing remarks on an issue in opposition

to summary judgment were insufficient to avoid waiver); *United States v. George*, 291 F. App'x 803, 805 (9th Cir. 2008) (holding party's "failure to adequately develop these arguments in his brief operates as a waiver"); *accord John-Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011) (the party "failed to develop any argument on this front, and thus has waived it"); *JustMed, Inc. v. Byce*, 580 F. App'x 566, 567 (9th Cir. 2014) ("Because [Defendant] did not properly raise this argument before the district court . . . the argument is waived."); *United States v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997) (where party fails to "coherently develop[]" an argument on appeal "we deem it to have been abandoned")).

The district court did not abuse its discretion in refusing to consider Lambert's newly presented damages model. *See Morales v. C.I.R.*, __ F. App'x __, 2015 WL 8734114, at *1 (9th Cir. Dec. 15, 2015) ("Indeed, we have held that 'abuse of discretion review precludes reversing the [trial] court for declining to address an issue raised for the first time in a motion for reconsideration.'") (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). This Court should likewise refuse to consider Lambert's arguments based on a restitutionary-disgorgement model.

(b) Even if Lambert had not waived this argument, his restitutionary-disgorgement model fails due to its reliance on waived and unreliable evidence.

Even if Lambert had not waived argument regarding his restitutionary-disgorgement model, it

would fail for the same reasons as his full-refund model. As the district court correctly noted, the object of restitution is "to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest." ER009 (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148, 131 Cal. Rptr. 2d 29 (Cal. 2003)). Restitutionary disgorgement of profits is available under California's Unfair Competition Law ("UCL"), but the disgorgement *must* be restitutionary in nature. *Korea Supply*, 131 Cal. Rptr. 2d at 40 (California Supreme Court stating that "[w]hile express authority to order restitution was added to the UCL, courts were not given similar authorization to order nonrestitutionary disgorgement"). Moreover, as noted by the district court, "Restitutionary disgorgement is limited to (1) money or property once in the plaintiff's possession and (2) money in which the plaintiff had a vested interest." ER010 (citing *Korea Supply*, 131 Cal. Rptr. 2d at 41-42). To the extent Lambert seeks to disgorge money that was not taken from the plaintiffs, "such monetar[y] relief is nonrestitutionary and unavailable under the UCL." *Id.*

Lambert's restitutionary-disgorgement model fails because he did not provide reliable evidence of an average retail price, which is necessary to ensure that the money being disgorged is restitutionary in nature. Instead, he presented *for the first time* in his motion for reconsideration purported evidence that could be used to calculate an average retail price derived from (1) Cobra's product guides that are distributed to retailers, (2) Lambert's deposition, and (3) Cobra's website from which it sells a negligible amount of product. ER010.

The district court correctly held that this newly presented—but *not* newly discovered—evidence was waived because Lambert failed to present it in his opposition to the decertification order or during oral argument. ER011 n.5 ("Again, this evidence Plaintiff relies on . . . is nowhere to be found in any of his opposition to decertify class. . . . Plaintiff does not claim that this evidence is newly discovered. Therefore, such evidence should have been presented to the Court in those previous opposition papers, not a motion for reconsideration.").

Even if Lambert had not waived this evidence, however, the district court correctly held that it was "unreliable in determining the average retail price." ER011. To start, the product guides are unreliable because "the prices wholesalers suggest to its retailers are not the prices at which retailers sell the product." *Id.* Lambert's reliance on the product guides fails to take into account the retailer's discretion in setting retail prices, "which is why the Court expected Plaintiff to collect data and present an average retail price." ER012. The district court found Lambert's reliance on his deposition testimony to provide an *average* retail price "illogical." *Id.* ("For Plaintiff to ask a juror to determine the average retail price based on one particular value a vendor (Rite-Aid) used in selling Cobra makes no sense."). Finally, Lambert's reliance on Cobra's website is "rife with problems." ER013. To start, the website only provides information about Cobra's direct sales to customers—a negligible amount. *Id.* Second, Lambert "does not seek to disgorge profits from [Cobra's] direct sales to consumers," so the information is irrelevant to his damages theory. *Id.*

Whether or not Lambert agrees with the district court's factual findings regarding this untimely disclosed evidence, he has not shown that such findings were "clearly erroneous." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013) (holding that this Circuit will reverse a lower court's findings of facts "only if they are (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the record") (internal quotation marks and citation omitted).

In sum, Lambert relies on waived and unreliable evidence to support a waived argument for an alternate damages theory not properly before this Court. His appeal should be denied.

VI. CONCLUSION

This Court should deny Lambert's appeal and uphold the district court's decertification order because Lambert's Rule 23(f) petition was time-barred under the Federal Rules of Civil Procedure and because he failed to show that the district court abused its discretion in decertifying the class.

Dated: February 25, 2016

Respectfully Submitted,

HUESTON HENNIGAN LLP

/s/ John C. Hueston
John C. Hueston

Attorney for Defendant-Appellee
NUTRACEUTICAL CORP.

STATEMENT OF RELATED CASES PURSUANT TO LOCAL APPELLATE RULE 28-2.6

Pursuant to Ninth Circuit Court of Appeals Local Rule 28-2.6, I hereby state that there are no cases known to be pending before this Court that are deemed to be related to this action.

Dated: February 25, 2016

/s/ John C. Hueston
John C. Hueston

Attorney for Defendant-Appellee
NUTRACEUTICAL CORP.

[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

JA 128

No. 15-56423 — Filed April 8, 2016

***In the* United States Court of Appeals**
***for the* Ninth Circuit**

TROY LAMBERT,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant
v.
NUTRACEUTICAL CORPORATION,
Defendant-Appellee.

Appeal from an Order of the United States District Court for the Central District of California, Case No. 2:13-cv-5942-AB-(Ex)

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[Table of Contents and Table of Authorities Omitted in Printing of this Appendix.]

I. INTRODUCTION

The district court's decision on class certification and refusal to recertify the class on Mr. Lambert's motion itself is contrary to longstanding Ninth Circuit practice and is therefore nearly indefensible. Defendant, in fact, made little effort to attempt that task. Instead, Defendant's Answering Brief ("Ans. Br."), which used less than half the word limit, is mostly concerns itself not with the merits of this appeal but with arguing, notwithstanding the decision of the Motions Panel, that the appeal is untimely.

II. THE DISTRICT COURT EXTENDED PLAINTIFF'S TIME TO FILE A MOTION FOR RECONSIDERATION, WHICH TOLLED HIS TIME TO APPEAL

"It has long been accepted that the time period to file an appeal generally runs from the denial of a timely motion for reconsideration, rather than from the date of the initial order. We see no good reason to depart from this 'well-established rule' and the 'traditional and virtually unquestioned practice' of applying it." *Briggs v. Merck Sharp & Dohme*, 796 F.3d 1038, 1046 (9th Cir. 2015) (internal citations omitted); *accord*, *Blair v. Equifax Check Servs.*, 181 F.3d 832, 837 (7th Cir. 1999).

Plaintiff informed the district court of his intention to file a motion for reconsideration well before the 14-day time period expired after the court decertified the class. *See* ER14 (at the Status Conference 10 days after the court decertified the class, the court stated "feel

free to file your motion for reconsideration, if that's what you desire.") At the conference, the district court set filing date of March 12, 2015 for Plaintiff's Motion for Reconsideration, and Plaintiff filed on this date. ("Plaintiff's counsel informs the Court of Plaintiff's intention to file a Motion for Re-Consideration. For the reasons stated on the record, the Court defers setting pretrial and trial dates until after the ruling on the Motion. The Motion shall be filed on or before March 12, 2015.") *See* ER131, 103. Given the district court's express willingness to consider a motion to recertify the class, and that it stayed other proceedings until it made a decision, it would have been procedurally inappropriate to file a Rule 23(f) petition, and likewise inappropriate as the practical death knell of Plaintiff's case had yet to toll.

III. THE MOTIONS PANEL WAS CORRECT TO GRANT THE PETITION TO REVIEW THE RECONSIDERATION ORDER UNDER 23(f)

In order to review the reconsideration order, an appellate court will necessarily also consider the order being reconsidered. *See Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) (reviewing entire class certification record after appeal from order denying motion for reconsideration).

On top of the Order Granting Defendant's Motion for Certification (hereinafter "Decertification Order"), Plaintiff *specifically appeals* the Order on Motion for Reconsideration (hereinafter "Reconsideration Order"), and the Motions Panel accepted his appeal of this order under Rule 23(f). *See* Order Granting 23(f) Petition, Appeal Doc. 1 ("The court, in its discretion, grants the petition for permission to appeal the district court's . . .

June 24, 2015 order denying the motion for reconsideration of the February 20, 2015 Order." (citing Fed. R. Civ. P. 23(f); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952 (9th Cir. 2005) (per curiam)).

In his Motion for Reconsideration, Plaintiff's single and entire objective was the certification of a class. Rule 23(f) expressly applies to any "order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered." Thus, because Plaintiff filed his Rule 23(f) petition within 14 days of the court entering its Reconsideration Order, and the petition was granted, this appeal is timely.

Further, Nutraceutical is wrong when it states the Reconsideration Order "merely reaffirmed the status quo." Ans. Br. at 11. In fact, the Reconsideration Order amended the previous Decertification Order by setting forth a plan for notice to the class regarding decertification. The ruling establishing this notice plan was previously absent from the Decertification Order. Part of Plaintiff's argument in his Motion for Reconsideration was that the Decertification Order was in error because it did not provide a plan for notice of class decertification. ER128-29. In the Court's Reconsideration Order it noted "Plaintiff is correct that class members must receive notice following class decertification" and ordered "Plaintiff to file a proposed notice with respect to class decertification." ER17-18. Thus, the Reconsideration Order augmented and amended the Decertification Order, in that it set forth a notice plan previously absent, and did not "merely reaffirm the status quo."

Nutraceutical's "merely reaffirmed the status quo" argument is further wrong because Rule 23(f) says nothing about "changing the status quo" as the test of which orders are subject to petitions. Rather, 23(f) governs not "orders that change the status quo" but "order[s] granting or denying class-action certification." Fed. R. Civ. P. 23(f).

The Ninth Circuit has previously accepted appeals such as this one of class certification decisions after a motion for reconsideration has been filed outside of the time to appeal the original decision. In *Parra v. Bashas', Inc.*, 536 F.3d 975 (9th Cir. 2008), the

> district court certified the proposed class as to [one] claim, but denied certification of the proposed class regarding [a separate] claim based upon a finding of lack of commonality within the class. Plaintiffs filed a motion for the district court to reconsider its motion and, in the alternative [redefine the denied class] . . . . Those motions were denied.

Id. at 976. In *Parra*, the district court's ruling on the original motion for class certification occurred on August 31, 2005. The plaintiffs in *Parra* filed a motion for reconsideration on September 15, 2005, fifteen days after the class certification order. In 2005, 23(f) provided ten rather than the current fourteen days to appeal. Either way, no petition was filed and it was fifteen days later the plaintiff sought reconsideration. When reconsideration was denied, this Court "granted Plaintiffs' request to file th[e] appeal pursuant to Fed. R. Civ. P. 23(f)," *Parra*, 536 F.3d at 977, and ultimately "reverse[d] the district court conclud[ing] that it abused its discretion in failing to find commonality in the

Plaintiffs' original class definition." *Id.* at 976. In other words, in a situation identical on all parts to this case, this Court accepted an appeal of a class certification order and motion to reconsider it under Fed. R. Civ. P. 23(f), and reversed the order denying class certification.

Finally, Defendant-Appellant's argument, in addition to running contrary to the actual text of Rule 23(f) and this Court's decision last year in *Briggs*, is illogical and suggests a deliberate waste of party and judicial resources should be required.

Here, the district court stated within the appeal window that it would reconsider its order. Mr. Lambert was fully ready and willing to file his 23(f) petition within the appeal window if the district court said it would not reconsider the order and sounded his case's death knell. The district court ultimately changed its initial decertification order in response to the motion for reconsideration, even while denying certification. Nutraceutical would have had Mr. Lambert, even after the district court stated it would reconsider its order, nonetheless file a petition to appeal. Then, if Lambert had been successful, he would have had to dismiss his petition, or his appeal had the petition been granted, and had he lost reconsideration, file a new or amended petition that incorporated the order denying reconsideration. Either way, Nutraceutical's position, if adopted, calls for the Motions Panel to regularly and needlessly consider 23(f) petitions that will inevitably either be amended or withdrawn. Here, there are only two relevant orders, but in other cases district courts deny certification without prejudice or deny certification pending additional evidence or briefing, often several times. Nutraceutical would have

plaintiffs, after receiving an unfavorable but not final decision on certification, nonetheless file a wave of petition after petition in order to preserve their right to appeal later if a final order denying certification is eventually issued later.

This simply makes no sense and is an illogical waste of court and party resources. Yet Rule 23(f), and Rule 23 generally is an intensely practical rule that has always been interpreted to avoid imposing needless costs on class action litigants. The Supreme Court has recognized that, first, the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's . . . labor." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

Here, the real "death knell" for Mr. Lambert's individually small consumer fraud claim was not when the class was decertified because the district court left open the possibility of recertification on motion to reconsider. The district court both ruled narrowly, stating it was a single issue of evidence not being in the record in response to Nutraceutical's broad motion, and within the appeal window it gave leave to seek reconsideration and set a schedule for doing so.

IV. PLAINTIFF PRESENTED WORKABLE DAMAGES MODELS

"In almost every class action, factual determinations of damages to individual class members

must be made. Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution. Indeed, to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device." *Leyva v. Medline Indus.*, 716 F.3d 510, 514 (9th Cir. 2013) (quoting *Brinker Rest. Corp. v. Sup. Court*, 53 Cal. 4th 1004, 1054 (2012)). Nutraceutical claims the district court correctly decertified the class because Plaintiff failed to present a "workable" damages model. *See* Ans. Br. at 20-24. This is wrong. In fact, Plaintiff presented three separate models, all supported by evidence. Plaintiff first presented expert evidence that the product was worthless, and had a value of $0.00, because it was dangerous, ineffective, and an unlawful, unapproved new drug. *See* ER159-72. As to the amount that the class should be awarded based on their purchases of a worthless product, he presented evidence allowing a restitutionary award to be calculated under three methods, all supported by evidence and permitted by California law: (1) Nutraceutical's revenue from the sale of the product during the Class period, as disclosed in discovery; (2) the sales of product multiplied by the defendant's suggested retail price; and (3) the sales of product multiplied by the jury's estimate of the average retail price.

At the hearing on the Motion for Class Decertification, counsel for Plaintiff affirmed to the court that damages could be calculated by using the revenue from the sale of the product during the Class period that Defendant disclosed in discovery. *See* ER 33 ("And we know how much the defendant received from the sale of the product because they've turned that

information over to us. Thus, we have the damages right there."); *see also* ER37-38; ER64 ("Mr. Weston: It would—well it would be the full refund in the sense all money that the defendant received from the plaintiffs from their purchases . . . . It would be the revenue received by the defendant from the wholesaler."); ER66 ("But restitution [sometimes] involves not getting every penny back the consumer paid but getting the money back that the defendant received . . . And we have those exact figures.") At the same hearing, counsel also referred the district court to the summary judgment briefing which calculated a precise figure of restitution based on disclosed revenue. *See* ER37 ("Mr. Weston: I would refer the Court to our summary judgment motion. In our summary judgment motion, we went in and we requested a specific amount on behalf of the entire class."); *see also* ER201-02 (calculating precise restitution figures and explaining the calculations), ER123-24 (detailed discussion of these calculations), ER112, 119-26 (defending the viability of this model under California law). Plaintiff further provided these calculations in a declaration supporting his Motion for Reconsideration.

Second, in Plaintiff's original Motion for Class Certification, he proposed a damages model based on the unit sales of product multiplied by the manufacturer's suggested retail price ("MSRP") set by the defendant. ER307-08. In the Decertification Order, the district court even recognized Plaintiff's model based on "average suggested retail price," but inconsistently went on to analyze the model as if it were based only on average actual retail price. *See* Op. Br. at 27-28 (emphasis added); *see also id.* at 28 n.2. Plaintiff obtained in discovery all the evidence

necessary to demonstrate the MSRP model, as he had both MSRP and the sales numbers of the product. ER352-353, 357-70. Plaintiff further provided these calculations in a declaration supporting his Motion for Reconsideration. *See* ER353-54.

Finally, Plaintiff also presented evidence to calculate restitution based on the unit sales of product multiplied by a reasonable price estimate, the method the district court wrongly insisted was the only possible measure of restitution. For example, he submitted evidence of retail price data from deposition testimony and from Defendant's direct website sales to consumers. *See* ER115-16, 352-353, 357-70. Further, through the data already available, as well as through sales testimony admissible at trial, Plaintiff could present satisfactory information for a jury to reliably estimate damages. The district court was wrong that Plaintiff only submitted "one suggested retail price" which could not "configure[] an average," concluding that Plaintiff presented a "speculative approach." ER14-15 n.8. In fact, Plaintiff presented evidence of prices from multiple sources, and had the ability to derive more before and at trial, which would enable a jury to configure an average retail price without undue speculation. Accordingly, Plaintiff could present evidence to support all three of his viable damages models.

Thus, the district court's determination that "Plaintiff claims that damages can be calculated based solely on Defendant's sales data but does not explain how to do so without the average retail price," ER27, and Nutraceutical's statement that the "district court decertified the class because Lambert failed to provide

'any evidence to calculate damages' either on a 'classwide or on an individual basis,'" are both simply wrong. Ans. Br. at 22 (quoting ER028). Nutraceutical's nonsensical argument that while "the court recognized that 'calculating damages need not be exact or 'mathematically precise,'" it could not consent to Lambert's "speculative approach," holds no weight. Ans. Br. at 20 (quoting ER014 n.8)

Additionally, despite arguing throughout their brief that the district court decertified the class because Lambert failed to present a "workable" damages model, Nutraceutical does not even address Lambert's contention that California law provides a court a "very broad" "full range of powers to accomplish complete justice." Op. Br. at 24-26. Similarly, Nutraceutical did not address Lambert's argument that the district court's refusal to allow Plaintiff to calculate damages based on wholesale revenue data was contrary to California law. *See* Op. Br. at 31-34. Nutraceutical, thus, failed to rebut that the district court had broad discretion to find any or all of Lambert's proposed damages models viable and erred in not allowing Lambert to use the wholesale price evidence. On top of this, Nutraceutical also failed to address Lambert's argument that additional evidence of retail prices for Cobra Sexual Energy could be adduced at trial. *See* Op. Br. at 30. Nutraceutical waived all arguments against these. "[A]n appellee waives any argument it fails to raise in its answering brief." *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) (citation omitted).

V. AVERAGE RETAIL PRICE WAS NOT THE ONLY WAY TO CALCULATE DAMAGES

Nutraceutical is incorrect when it argues "Lambert's failure to provide an average retail price was a failure to produce the evidence necessary to demonstrate class-wide damages." Ans. Br. at 20. In fact, Plaintiff has retail price data from deposition testimony and Nutraceutical's direct website sales, both sufficient to calculate damages. Plaintiff further has evidence from the MSRP of Cobra and can provide additional evidence through testimony at trial. All of this evidence is sufficient to prevent "speculation" in calculating damages. The district court was incorrect in ruling that "there is simply no evidence to calculate damages under Plaintiff's damages model." ER28.

Nutraceutical's citation to *Werdebaugh v. Blue Diamond Growers*, 2015 U.S. Dist. LEXIS 10646 (N.D. Cal. Jan. 29, 2015) in support of its argument that Plaintiff failed to present evidence to make his damages model workable is completely inapposite. *Werdebaugh* involved health claims on an almond milk product. *See Werdebaugh v. Blue Diamond Growers*, 2014 U.S. Dist. LEXIS 173789, at *2-3 (N.D. Cal. Dec. 15, 2014). Much like *Caldera* and *Astiana*, discussed *infra* and in great detail Lambert's opening brief, the damages calculations in *Werdebaugh* required finding the "true value" of the product absent the alleged conduct, then the price premium of the product at issue over the "true value." *See* Op. Br. at 17-20. Plaintiffs in *Werdebaugh* had a damages model requiring more complex evidence as to the price premium. Thus, the *Werdebaugh* court ruled that the plaintiff "failed to put forth a damages model that measured the damages

attributable to Defendant's wrongful conduct." 2015 U.S. Dist. LEXIS 10646, at *10. Here, Plaintiff's full-refund model, which the court found "is consistent with [Plaintiff's] theories of liability," ER22, requires less evidence to calculate damages and Plaintiff provided three viable methods, with supporting evidence, to make these calculations. *See* Op. Br. at 7-8; *see also supra* Section IV.

While it cited a new and similar case, Nutraceutical did not even try to address Lambert's detailed discussion of why the district court erred by relying on inapplicable cases like *Caldera v. J.M. Smucker Co.*, 2014 U.S. Dist. LEXIS 53912 (C.D. Cal. Apr. 15, 2014) and *Astiana v. Ben & Jerry's Homemade, Inc.*, 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014), as well as its peculiar decision to rely on the inapplicable, aged, and out-of-circuit *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 135-36 (S.D.N.Y. 2006), involving federal antitrust law, not California consumer fraud statutes, despite plentiful recent, relevant, in-circuit authority in cases arising under California consumer protection statutes. *See* Op. Br. 17-20. And again, while these cases, all involving false claims that alleged allowed food with some real value had been sold for more than that value, are not relevant to a case involving a dangerous, ineffective, illegal, and wholly valueless product, they are also all decided contrary to California restitution law and this Court's decision in *FTC v. Figgie*, 994 F.2d 595 (1993), as discussed in the opening brief.

VI. PLAINTIFF DID NOT WAIVE ANY ARGUMENT REGARDING ANY OF HIS MODELS

Nutraceutical claims Plaintiff waived his argument related to his restitutionary-disgorgement model "by failing to raise it both in his opposition to Nutraceutical's decertification motion and during oral argument." Ans. Br. at 24. More than "allud[ing] that this restitutionary-disgorgement model was mentioned in his motion for summary judgment," *id.*, Lambert's counsel pointed the court directly to it during oral argument. *See* ER37 ("Mr. Weston: I would refer the Court to our summary judgment motion. In our summary judgment motion, we went in and requested a specific amount on behalf of the entire class.") He also described in detail these calculations. *See* ER37-38.

Thus, the restitutionary-disgorgement model was not "newfound," but rather already part of the record and described in great detail in Mr. Lambert's pending motion for summary judgment, which he referred to repeatedly in his motion papers and at oral argument. Both Nutraceutical and the district court are wrong when they claim Plaintiff "fail[ed] to explicitly raise this newly proposed alternative damages model argument[] in his opposition papers or oral argument." Ans. Br. at 25 (quoting ER8). In fact, Lambert explained how the summary judgment motion, then fully submitted before the district court, calculated a precise dollar amount of damages for the certified class and cited many supporting California authorities for that calculation. ER119-26.

VII. CALCULATION OF RESTITUTION AND DAMAGES DOES NOT REQUIRE AVERAGE RETAIL PRICE

Nutraceutical argues that "Lambert's restitutionary-disgorgement model fails because he did not provide reliable evidence of an average retail price, which is necessary to ensure that the money being disgorged is restitutionary in nature." Ans. Br. at 27. The district court likewise ruled that "Plaintiff needs both pieces of evidence using this model—Defendant's sales to its retailers and the average retail price used in selling Cobra—to bridge the gap between Defendant's gains and Plaintiff's ownership interest within those gains." ER13 n.7.

This argument is profoundly illogical. Both Nutraceutical and the district court concede that the damages model would be acceptable if Plaintiff had presented evidence of the actual retail prices paid by class members. If Plaintiff and class members have "an ownership interest" in the full retail price they paid for the product, they must also have an ownership interest in the lessor amount represented by the wholesale fraction of the retail price, and there is no dispute that Nutraceutical produced its wholesale revenue from Cobra Sexual Energy, which Plaintiff presented to the district court. The district court's holding that the only proper measure of damages for a worthless product sold at stores is total retail sales, simply has no support under California law, and cannot be used to decertify a class found to have met all of the requirements of Rule 23.

VIII. COBRA IS A DANGEROUS, ILLEGAL PRODUCT

In considering Plaintiff-Appellant's appeal, the Court should not be blind to the underlying facts of the case. The FDA promulgated 21 C.F.R. § 310.528 (the "Aphrodisiac Drug Rule") which states "[a]ny product that bears labeling claims that it will arouse or increase sexual desire, or that it will improve sexual performance, is an aphrodisiac drug product" and may not be offered for sale without first undergoing clinical testing and FDA approval. 21 C.F.R. § 310.528(a). The FDA provides several examples of prohibited aphrodisiac claims, including: "arouses or increases sexual desire and improves sexual performance"; "helps restore sexual vigor, potency, and performance"; "improves performance, staying power, and sexual potency"; and "builds virility and sexual potency." *Id.* These are all claims that Defendant makes for "Cobra Sexual Energy" using nearly identical language, as shown in the following chart:

Aphrodisiac Drug Rule (21 C.F.R. § 310.528)	Claims Made on the Label of Cobra
labeling claims that it will arouse or increase sexual desire, ***or that it will improve sexual performance***	• Cobra Sexual Energy • Powerful Men's Formula • **Perform Your Best with Animal Magnetism**

Korean ginseng . . . **yohimbine** . . . have been present as ingredients in such drug products . . . There is a lack of adequate data to establish general recognition of the safety and effectiveness of any of these ingredients, or any other ingredient, for OTC use as an aphrodisiac.	• **Yohimbe** & Horny Goat Weed • **Korean Ginseng**- Most famous of all performance enhancing herbs. Ginseng is prized in the Orient. • **Yohimbe** Bark Extract-Legendary herb from Africa that contains **Yohimbine**.
Labeling claims for **aphrodisiacs** for OTC use are either false, misleading, or **unsupported by scientific data**.	• For centuries, men have used various herbs, roots and '**aphrodisiac**' plants to enhance their sexuality and improve their performance • **Scientifically blending** select, high-quality herbs into proprietary formulas is our art.
The following claims are examples of some that have been made for aphrodisiac drug products for OTC use: ... **"builds virility and sexual potency."**	• **Take Virility to the Max!** • Muira Puama Stimulating Brazilian herb known as **"potency wood"**.

any OTC drug product containing ingredients for use as an aphrodisiac **cannot be generally recognized as safe and effective**.	Saw Palmetto North American herb known for its reputed ability to **help promote prostate function**.

Nutraceutical believes it has cleverly found a path around the FDA's Aphrodisiac Drug Rule by calling Cobra a "supplement" and using slight variations on the label claims the FDA specifically found false and unlawful. However, the true identity of the product is clear. Further, Nutraceutical is endangering the public with its bogus product. The National Institute of Health's National Center for Complementary and Integrative Health states it "is not known whether yohimbe is effective for any health condition" and cautions yohimbe "can be dangerous if taken in large doses or for long periods of time."[1] The NIH also advises people not to take yohimbe if they have kidney problems or psychiatric conditions or use MAO inhibitors.[2] *Id.* The NIH further warns yohimbe "should be used with caution when taken with medicines for high blood pressure, tricyclic antidepressants, or phenothiazines." *Id.* A surveillance study of dietary supplement-related poison control center calls found that yohimbe products accounted for almost a fifth of all exposures to dietary supplements that led to

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[1] https://nccih.nih.gov/health/yohimbe (last visited April 4, 2016)

[2] MAO inhibitors, which can have a dangerous interaction with the yohimbe in Cobra, are a widely prescribed class of drugs that include several anti-depressants.

negative symptoms, despite being a very small percentage of dietary supplement sales.[3] [4]

CONCLUSION

For the foregoing reasons, orders of the district court decertifying the class and denying recertification should, respectfully, be vacated.

Dated: January 27, 2016

Respectfully Submitted,

/s/ Gregory S. Weston

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[3] C. Haller et al., *Dietary Supplement Adverse Events: Report of a One-Year Poison Center Surveillance Project*, 4 J. MED. TOXICOLOGY 84 (June 2008) (available at http://tinyurl.com/lambert101)

[4] In addition to consumer danger, use of yohimbe bark products also is a danger to our natural environment. *See* Alves, Biodiversity, traditional medicine and public health: where do they meet?, J. ETHNOBIOLOGY AND ETHNOMEDICINE, 2007, 3:14. ("Wild populations of . . . yohimbe (Pausinystalia yohimbe) are currently harvested in unsustainable and destructive ways in order to feed international markets.")

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[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

No. 15-56423 — Filed September 29, 2017

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TROY LAMBERT,
Plaintiff-Appellant,

v.

NUTRACEUTICAL CORP.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California,
No. 2:13-cv-5942-AB-(Ex)

PETITION FOR REHEARING EN BANC

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INTRODUCTION AND RULE 35 STATEMENT

This case presents a paradigm example of where en banc review is necessary. In a published opinion reversing the district court's decertification of a class action, the panel addressed an issue of first impression in the Ninth Circuit—whether equitable tolling excuses a party's failure to file its interlocutory appeal within the fourteen-day window set forth in Federal Rule of Civil Procedure 23(f)—and issued a legally erroneous and misguided decision that conflicts with all seven U.S. Courts of Appeal to have addressed the issue.

As every other U.S. Court of Appeal to consider this issue has correctly held, the sole way one can toll Rule 23(f)'s deadline is by filing a motion for reconsideration within fourteen days of the district court's order. *See, e.g.*, *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within [fourteen] days if it is going to toll the [] period within which to seek permission to appeal."); *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 192 (3d Cir. 2008) (Rule 23(f)'s deadline is "strict and mandatory.")

The panel here held the opposite, ruling that "equitable circumstances beyond a formal motion to reconsider filed within fourteen days can toll the Rule 23(f) deadline." (Op. at 21.) Applying this standard, the panel excused Plaintiff-Appellant Lambert's failure to file his motion for reconsideration until *twenty* days after the district court decertified the class. In doing so, the panel admitted "other circuits would likely not toll

the Rule 23(f) deadline in Lambert's case," and made clear the Ninth Circuit would "part ways with them." (Op. at 16.)

The panel's holding on the merits was also legally erroneous; as described below, it directly violates the Supreme Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), and California's prohibition against non-restitutionary damages in this context.

En banc review is warranted for several reasons:

First, the decision violates Federal Rule of Appellate Procedure 26(b)(1)'s prohibition against extending the time to file a petition for permission to appeal. *See Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013) (rejecting Rule 23(f) petition because FRAP 26(b)(1) "clearly states that this Court cannot extend the time for filing a petition for permission to appeal."). The panel's opinion does not even discuss FRAP 26(b)(1).

Second, the decision contravenes the purpose behind Rule 23(f)'s deadline, which was "designed to reduce the risk that attempted appeals will disrupt continuing proceedings," and improperly places the Ninth Circuit at odds with every other circuit to consider this issue. Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendment); *see also Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1290 (11th Cir. 2007) ("[T]he [] deadline provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy."); *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999) (Rule 23(f)'s deadline is "deliberately small.").

Third, the panel's broad and vague holding that "equitable circumstances," such as filing "a letter" or making a "verbal representation conveying an intent to seek reconsideration," will toll Rule 23(f)'s deadline, creates an unworkable standard that will exacerbate the delay and disruption caused by interlocutory appeals and increase this Court's workload. Indeed, the decision requires that this Court, going forward, scour district court records to determine whether petitioners ever sent a letter, made verbal representations, or otherwise engaged in conduct that warrants equitable tolling. It also disincentivizes litigants from diligently filing interlocutory appeals and increases the number of petitions filed in this Court and the disruption of district court proceedings. Notably, the panel's reasoning is explicitly not limited to Rule 23(f) and could spread to other deadlines and contexts. (*See* Op. at 11.)

Fourth, the panel's holding on the merits, which improperly allows the class to obtain damages not permitted by California law, violates the Supreme Court's holding in *Comcast* that, to obtain class certification, plaintiffs must provide a damages model that "measure[s] ***only*** those damages attributable to th[eir] theory" of liability. 569 U.S. at 35 (emphasis added).

For these reasons, the decision raises "questions of exceptional importance" and should be reheard en banc to ensure uniformity with the other circuits and Supreme Court precedent, to ensure this Court's compliance with the Federal Rules of Appellate Procedure, and to prevent the negative consequences it

will have on class-action proceedings and other interlocutory appeals.

ARGUMENT

I. THE PANEL'S DECISION TO EXCUSE LATE RULE 23(f) PETITIONS WAS LEGALLY ERRONEOUS AND CREATED A CIRCUIT SPLIT

Rule 23(f) governs interlocutory appeals of "order[s] granting or denying class-action certification." Fed. R. Civ. P. 23(f). This Court has recognized that Rule 23(f) petitions, like other interlocutory appeals, are "generally disfavored because they are disruptive, time-consuming, and expensive." *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

Thus, Rule 23(f) establishes a "strict and mandatory" deadline. *Gutierrez*, 523 F.3d at 192. It states "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule *if* a petition for permission to appeal *is filed* with the circuit clerk *within 14 days* after the order is entered."[1] Fed. R. Civ. P. 23(f) (emphasis added); *see also Beck v. Boeing Co.*, 320 F.3d 1021, 1022 (9th Cir. 2003) ("We may exercise our discretion to review a district court's Rule 23 class action certification order ***only if*** an 'application is made to [us] within [fourteen] days after entry of the [district court's] order.'") (quoting Fed. R. Civ. P. 23(f) (emphasis added)).

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[1] Rule 23(f) was amended in 2009 to provide a fourteen-day deadline including weekends and holidays. The original rule imposed a ten-day deadline excluding weekends and holidays.

Here, the district court decertified the class on February 20, 2015. Lambert's deadline to file a Rule 23(f) petition was March 6. Lambert missed the deadline. He never even informed the district court of his intent to file a Rule 23(f) petition. Instead, at a March 2 status conference, Lambert requested permission to file a "renewed motion for class certification." (SER 11–12). The court denied that request, but acknowledged Lambert could file a motion for reconsideration and set a March 12 deadline. (*Id.* at 16–17). Lambert filed his motion for reconsideration, which the court denied on June 24, finding that Lambert failed to produce evidence necessary to calculate restitutionary damages (the only damages allowed by California law) and "Plaintiff's continued attempt to manipulate his evidence to satisfy a restitutionary measurement is obvious." (ER16:12–14.) Lambert subsequently filed his Rule 23(f) petition on July 8—more than four months late.

Despite this, the panel concluded that Lambert's petition was timely. Contrary to every circuit to consider the issue, the panel held that "equitable circumstances beyond a formal motion to reconsider filed within fourteen days can toll the Rule 23(f) deadline." (Op. at 21.) The panel held that Lambert tolled the Rule 23(f) deadline when he "conveyed his intention" to file a motion for reconsideration at the March 2 status conference. (*Id.* at 15–16.)

A. The Panel Violated FRAP 26(b)(1)'s Prohibition on Extensions to File a Petition for Permission to Appeal

By applying equitable tolling to extend the deadline to file a Rule 23(f) petition, the panel violated Federal

Rule of Appellate Procedure 26(b)(1), which plainly states that this Court "may not extend the time to file . . . a petition for permission to appeal."

Numerous U.S. Courts of Appeal have held that FRAP 26(b)(1) prohibits extending the time to file a Rule 23(f) petition. *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal."); *Eastman*, 736 F.3d at 677 (same); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) (per curiam). Indeed, this Court has applied FRAP 26(b) to dismiss untimely appeals. *See, e.g., U.S. ex rel. Haight v. Catholic Healthcare W.*, 602 F.3d 949, 955 (9th Cir. 2010) ("Rule 26 does not allow us to extend the time for Plaintiffs to file their notice of appeal.") Yet the panel here did not even address FRAP 26(b)(1).

B. The Panel Created a Conflict with Seven U.S. Courts of Appeal

The panel created a conflict with all seven U.S. Courts of Appeal (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh) that have addressed this issue. (Op. at 16 (admitting "other circuits would likely not toll the Rule 23(f) deadline in Lambert's case").) While those courts held that a motion for reconsideration filed *within* Rule 23(f)'s fourteen-day deadline may toll the time to file a Rule 23(f) petition, they uniformly rejected the panel's conclusion that other equitable tolling is available. *See McNamara*, 410 F.3d at 281 ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within [fourteen] days if it is going to toll" Rule 23(f)'s deadline.); *Gary*, 188 F.3d at 892 ("[I]f the request for reconsideration is

filed more than [fourteen] days after the order . . . appeal must wait until the final judgment."); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) ("An out-of-time motion for reconsideration . . . cannot restart the clock for appellate review under Rule 23(f)."); *Fleischman*, 639 F.3d at 31 (a contrary holding "would eviscerate [Rule 23's] deliberate and tight restriction on interlocutory appeals"); *In re DC Water and Sewer Auth.*, 561 F.3d 494, 185–86 (D.C. Cir. 2009) (rejecting late Rule 23(f) petition); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1192 (10th Cir. 2006) (same).

In fact, other circuits rejected the panel's reasoning in ***identical circumstances***—*i.e.* where a litigant files a motion for reconsideration pursuant to the district court's order but after Rule 23(f)'s deadline. In *Gutierrez*, the Third Circuit rejected an untimely Rule 23(f) petition even though the plaintiffs requested an extension to file a motion for reconsideration within ten days of the order denying certification, the district court granted the request, and plaintiffs filed a Rule 23(f) petition within ten days of the order denying their motion for reconsideration. 523 F.3d at 190–91. The court held "it is the [fourteen]-day period in Rule 23(f), and not any other schedule or time period, that dictates whether a motion to reconsider will toll Rule 23(f)'s strict time period." *Id.* at 194; *see also id.* at 198 ("Petitioners cannot use the District Court's approval of the extension of time to save their untimely petition.").

In *Jenkins*, the Eleventh Circuit held that a Rule 23(f) petition was untimely where the plaintiffs missed the deadline on the eve of Thanksgiving Day, even though the petition was only two days late, the

plaintiffs had instructed a courier to file the petition before the deadline, and the district court vacated and reentered its order to restart the deadline. 491 F.3d at 1289–92. The court held that the "single opportunity for seeking interlocutory review of the denial of class certification expired on November 22, 2006, and . . . the district court was without the authority to circumvent the [] deadline." *Id.* at 1292; *see also Delta Airlines*, 383 F.3d at 1145 (rejecting Rule 23(f) petition filed only two days late where counsel had mistakenly relied on the grace period in Rule 6(e) and FRAP 26(c) and the district court had granted an extension).

In an attempt to support its departure from other circuits, the panel cited *McNamara*, 410 F.3d at 279, and *Gary*, 188 F.3d at 893, for the unremarkable proposition that a district court may treat a filing as a motion for reconsideration, even if it is not formally designated as such. (Op. at 14–15.) Neither case, however, supports the panel's conclusion that Lambert tolled the Rule 23(f) deadline by stating during a status conference that he intended to file a motion for reconsideration. Rather, both cases squarely held that only a motion for reconsideration filed within fourteen days of the district court's order can toll the Rule 23(f) deadline. *McNamara*, 410 F.3d at 281; *Gary*, 188 F.3d at 892.

When the Seventh Circuit held in *Gary* that it does not "matter [] what caption the litigant places on the motion to reconsider," the court obviously meant that, after a district court certifies a class, it does not matter whether the defendant files a motion for reconsideration or motion to decertify. In either scenario, the motion must be filed within fourteen days

to toll the Rule 23(f) deadline. *Gary*, 188 F.3d at 892-93. Similarly, while the Fifth Circuit held in *McNamara* that the district court appropriately treated a "Trial and Case Management Plan" ("TCMP") as a motion for reconsideration, the TCMP was not even remotely similar to Lambert's perfunctory, *oral* representation. Rather, the TCMP was a 36-page filing that included extensive argument on class certification and was formally opposed in writing. *See McNamara v. Bre-X Minerals, Ltd.*, No. 5:97-CV-159 (E.D. Tex. 2003), Trial and Case Management Plan, ECF No. 896.

Thus, neither *Gary* nor *McNamara* support the panel's decision. All seven circuits discussed above would have rejected Lambert's petition.

Moreover, the Supreme Court decided in an analogous context that a district court's scheduling order cannot toll the deadline to file a notice of appeal. In 2016, the Court resolved a circuit split by amending FRAP 4(a)(4) to clarify that the time to file a notice of appeal may be tolled by the filing of certain post-judgment motions—but only if they are timely filed pursuant to deadlines in the Federal Rules of Civil Procedure. That rule "is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules." Fed. R. App. P. 4 advisory committee's note (2016 Amendment). This suggests that the Court would reject the panel's reliance on the district court's scheduling order.

C. The Panel's Reasons for Creating a Circuit Split are Unfounded

The panel provided three justifications for placing the Ninth Circuit at odds with its sister circuits. None have any support in law, fact, or logic.

First, the panel claimed that "[l]itigants have no reason to know that their deadline for filing a motion for reconsideration is effectively fourteen days, rather than whatever the district court has ordered." (Op. at 17.) That is incorrect. Rule 23(f), which all litigants are on notice of, clearly requires a petition to be filed "within 14 days after the order is entered." Fed. R. Civ. P. 23(f).

While Rule 23(f) does not state whether a motion for reconsideration affects the deadline, there is ample case law from this Court and other circuits (as noted above) holding that a motion for reconsideration may toll an appeal ***provided*** it is filed within Rule 23(f)'s fourteen-day window. Indeed, this Court expressly adopted that rule in *Briggs v. Merck Sharp & Dohme* when it held that the deadline to appeal an order remanding a class action "runs from . . . the date of an order granting or denying reconsideration, *provided* the motion for reconsideration was *timely* filed." 796 F.3d 1038, 1046 (9th Cir. 2015) (emphasis added). Importantly, *Briggs* noted that its holding was "consistent with the rule applied in other circuits," and cited appellate cases from the Rule 23(f) context for the proposition that a "timely" motion for reconsideration is one filed *within fourteen days* of an order granting or denying class-action certification. *Id.* at 1047.

It is also well-established that ignorance of the law does not constitute grounds for equitable tolling. *Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th Cir. 2006) ("Mistakes of law or ignorance of proper legal procedures are not extraordinary circumstances warranting invocation of the doctrine of equitable tolling."). Rather, equitable tolling is only available if a litigant pursued his rights "diligently" and "some extraordinary circumstance stood in [his] way." *Rudin v. Myles*, 781 F.3d 1043, 1054 (9th Cir. 2015). There is no reason to stray from that rule in this case.[2] This Court should put the burden on litigants to apprise themselves of the relevant deadlines and diligently file a motion for reconsideration within fourteen days to prevent further disruption of district court proceedings.

Second, the panel based its holding on the false premise that Rule 23(f) petitions are not generally disruptive and slow. (Op. at 18.) The Supreme Court, however, found the opposite when it promulgated Rule 23(f), which is why, as the Advisory Committee notes explain, the Court adopted a narrow window for filing a petition. Fed. R. Civ. Proc. 23(f) advisory committee's note (1998 Amendment) (the deadline "is designed to reduce the risk that attempted appeals will disrupt continuing proceedings"); *see also Gary*, 188 F.3d at 893 (Rule 23(f)'s deadline is "deliberately small.").

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[2] This is especially true because: (i) there is no evidence that Lambert even considered the Rule 23(f) deadline before filing his motion for reconsideration; and (ii) the district court did not prevent Lambert from filing a timely Rule 23(f) petition or motion for reconsideration.

Critically, this Court previously reached the same conclusion. *Chamberlan*, 402 F.3d at 959 ("Although Rule 23(f) expands opportunities to appeal certification decisions, the drafters intended interlocutory appeal to be the exception rather than the rule" because they are "disruptive, time-consuming, and expensive."). The panel cannot rely on its subjective views to reject Rule 23(f)'s purpose and the Supreme Court's intent in promulgating it.

D. The Panel Adopted an Unworkable Standard That Will Waste Ninth Circuit Resources, Delay Cases, and Create Confusion

The panel's holding that "equitable circumstances beyond a formal motion to reconsider filed within fourteen days can toll the Rule 23(f) deadline," such as "a letter or verbal representation conveying an intent to seek reconsideration," is a vague and impractical standard that will exacerbate the problems with interlocutory appeals. (Op. at 21.) It will "add to the heavy workload of the appellate courts, require consideration of issues that may become moot, [] undermine the district court's ability to manage the class action," and create substantial delay and confusion. *See Chamberlan*, 402 F.3d at 959.

Under its decision, litigants have no incentive to diligently pursue motions for reconsideration or Rule 23(f) petitions within fourteen days of a district court's order. Instead, litigants can preserve their right to file Rule 23(f) petitions by simply writing a letter or orally informing the district court that they *intend* to file a motion for reconsideration. District courts will undoubtedly see an influx of such communications and,

at the least, this will add weeks or months to the already significant delays associated with Rule 23(f) petitions.

The decision will also lead to an increase in the number petitions that are filed in, and granted by, this Court. A screening panel can no longer rely on the Rule 23(f) deadline to deny petitions. Rather, this Court will need to scour the district court record, including transcripts, to determine whether the petitioner engaged in any conduct that would entitle him to equitable tolling. This type of review, and the resulting increase in Rule 23(f) petitions that are granted, will add even more work to this Court's heavy docket.

It will also create even more uncertainty in the law. As this Court is aware, equitable tolling issues are fact-dependent. This Court will be confronted with situations where it is debating whether a verbal representation at a status conference, a letter, or a call to the clerk's office was sufficient to toll the Rule 23(f) deadline. Courts should not "adopt a construction of Rule 23(f) that would regularly require mental gymnastics just for the purpose of giving litigants a second bite at the interlocutory-appellate-review apple." *Carpenter*, 456 F.3d at 1191.

Likewise, the panel's reliance on the district court's briefing schedule will require this Court to consider whether a petitioner has complied with a district court's schedule. This defeats the very purpose of having a uniform federal deadline. For example, local rules governing motions for reconsideration vary across district courts. The Central District of California has no deadline, while the Southern District of California requires motions for reconsideration to be filed within

28 days. C.D. Cal. L.R. 7–18; S.D. Cal. CivLR 7.1(i); *see also* N.D. Cal. Civil L.R. 7–9 (requiring leave of court); D. Ariz. LRCiv 7.2(g) (fourteen-day deadline). This Court now must take the local rules (and their differences) into account.

For similar reasons, the standard will inject uncertainty into, and prolong, district court proceedings. Although a district court need not enter a stay when a Rule 23(f) petition is pending, very few district courts will continue to litigate a case and potentially waste judicial resources while an appeal is pending. In this case, district court proceedings were stayed for over *two years*.

Finally, the panel's reasoning is not limited to Rule 23(f). The panel appears to believe that broad equitable tolling applies to any non-jurisdictional deadline. (*See* Op. at 11 ("Because the Rule 23(f) deadline is not jurisdictional, equitable exceptions, such as tolling, may apply.").) If so, the delay, confusion, and waste of judicial resources caused by the panel's decision may well spread to other areas.

II. THE PANEL'S DECISION ON THE MERITS IS CONTRARY TO SUPREME COURT PRECEDENT AND CONTROLLING CALIFORNIA LAW

In *Comcast*, the Supreme Court held that class certification is not appropriate unless plaintiffs offer a damages model that "measure[s] ***only*** those damages attributable to th[eir] theory" of liability. 569 U.S. at 35 (emphasis added). There is no dispute that the only damages attributable to Lambert's liability theory is a full refund of money that class members actually paid.

Indeed, under California law, non-restitutionary disgorgement—*i.e.* recovery of a defendant's gain, as opposed to plaintiff's loss—is strictly prohibited. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1147-49 (2003). That is, plaintiffs are limited to seeking damages they have an "ownership interest" in, and nothing more. *Id.* at 1147. As the district court held, to determine the plaintiffs' ownership interest, Lambert was required to provide evidence of the product's average retail price. (ER 14.)

Applying *Comcast* and *Korea Supply*, the district court correctly held that, with discovery closed, Lambert had failed to produce a damages model that satisfied *Comcast* because he had no evidence of what class members actually paid, *i.e.* the average retail price.[3] (ER 25-29.) While Lambert argued that he could use *suggested* retail price, the district court correctly recognized that this method would result in non-restitutionary damages because "the prices wholesalers suggest to its retailers are ***not*** the prices at which retailers sell the product." (ER 11) (emphasis added); *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liability Litig.*, 2016 WL 6248426, at *18 n.5 (N.D. Cal. Oct. 25, 2016) (describing suggested retail price as "an unreliable measure of purchase price"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 513 F. Supp. 1100,

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[3] This requirement, which was made clear to Lambert early in the litigation, was hardly insurmountable. Lambert could have easily obtained this data through various methods, including subpoenaing sales data from retail stores, consumer surveys, and expert witnesses. Lambert should not be rescued from his lack of diligence by dismantling Supreme Court precedent.

1301 (E.D. Pa. 1981) (concluding "there was no relationship between [suggested retail price] and the actual selling price").

Critically, the panel's decision ***did not even discuss*** California's limitation on non-restitutionary damages, which was the primary basis for the district court's decision. Nor did the panel explain (nor could it) how suggested retail price reflects plaintiffs' ownership interest. (Op. at 25.)[4] Instead, the panel mischaracterized the district court's decision and created a straw man by focusing solely on whether "uncertain damages calculations alone can[] defeat certification." (Op. at 22-23.) Yet the district court repeatedly made clear that it was *not* holding that Lambert needed to provide mathematically precise damages. (ER 24 ("For a damages model such as this, '[c]alculations need not be exact.'"); ER 26 ("Although the average retail price does not have to be exact, it is nevertheless critical at this stage of the litigation.").) The district court simply held that, under *Comcast*, Lambert was required to provide a damages model that "measure[s] ***only*** those damages attributable to [his] theory" of liability. 569 U.S. at 35 (emphasis added).

In short, the panel failed to engage in this required analysis and ignored controlling precedent. The consequences of the panel's decision will be significant. Under it, class plaintiffs have no obligation to produce a workable damages model that only measures those damages attributable to their theory of liability—*i.e.*

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[4] Relatedly, the panel failed to explain how the district court could have abused its discretion by making a *factual* determination that suggested retail price did not reflect plaintiffs' ownership interest.

district courts are required to essentially ignore *Comcast*. Put another way, class plaintiffs need not do anything other than offer a class-wide measure of damages—the very same low standard for certification that *Comcast* expressly rejected. 569 U.S. at 35–36 ("Under that logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.") (emphasis in original).

CONCLUSION

For these reasons, rehearing en banc is necessary and appropriate.

Dated: September 29, 2017

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[*Certificate of Compliance and Certificate of Service Omitted in Printing of this Appendix.*]

No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORP.,

Petitioner,

v.

TROY LAMBERT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(f) establishes a 14-day deadline to petition for permission to appeal an order granting or denying class-action certification. On numerous occasions, this Court left undecided whether mandatory claim-processing rules, like Rule 23(f), are subject to equitable exceptions, because the issue was not preserved. *See, e.g.*, *Hamer v. Neighborhood Hous. Serv. of Chi.*, 138 S. Ct. 13, 18 n.3, 22 (2017). That obstacle is not present here.

The question presented is: did the Ninth Circuit err by holding that equitable exceptions apply to all mandatory claim-processing rules, such that Respondent's failure to petition for permission to appeal or file a motion for reconsideration before the Rule 23(f) deadline was excusable despite Petitioner's timely objection?

As the Ninth Circuit acknowledged below, its decision conflicts with other United States Circuit Courts of Appeals that have considered this issue (the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner is Nutraceutical Corporation ("Nutraceutical"). In the proceedings below, Nutraceutical was the defendant-appellee. The parent corporation of Nutraceutical is Nutraceutical International Corporation. The parent corporation of Nutraceutical International Corporation is Nutrition Parent, LLC. No publicly held company owns 10% or more of Nutraceutical's stock.

The Respondent is Troy Lambert. In the proceedings below, Lambert was the plaintiff-appellant.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 870 F.3d 1170, and reprinted at Petitioner's Appendix 1. The District Court's order granting Nutraceutical's motion to decertify the class is not published in the *Federal Supplement*, but it is available at 2015 WL 12655388, and reprinted at Petitioner's Appendix 52. The District Court's order denying Respondent Lambert's motion for reconsideration is not published in the *Federal Supplement*, but it is available at 2015 WL 12655392 and reprinted at Petitioner's Appendix 27. The Ninth Circuit's order denying Nutraceutical's petition for rehearing en banc is reprinted at Petitioner's Appendix 67.

JURISDICTION

The Ninth Circuit entered judgment in this case on September 15, 2017. Pet. App. 1. On November 3, 2017, the Ninth Circuit denied Nutraceutical's petition for rehearing en banc. Pet. App. 67. This Court granted Nutraceutical's timely filed petition for a writ of certiorari on June 25, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Civil Procedure 23(f) provides:

> (f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered.

> An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.[1]

Federal Rule of Appellate Procedure 5(a) provides:

> (a) Petition for Permission to Appeal.
>
> > (1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.
> >
> > (2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.
> >
> > (3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to a party's motion, to include the required permission or statement. In that event, the time to petition runs from entry of the amended order.

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[1] Prior to December 1, 2009, Rule 23(f) established a deadline of ten days rather than fourteen.

Federal Rule of Appellate Procedure 26(b)(1) provides:

> (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
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> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
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> (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

Federal Rule of Appellate Procedure 2 provides:

> On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

STATEMENT OF THE CASE

Lambert filed the underlying class action against Nutraceutical on March 14, 2013, alleging violations of California's false advertising and unfair competition laws arising out of Nutraceutical's sale of a dietary supplement. The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(d)(2).

The District Court initially certified the class on June 19, 2014. Following the close of discovery, on February 20, 2015, the District Court granted Nutraceutical's motion to decertify the class because Lambert failed to demonstrate both predominance, *see* Fed. R. Civ. P. 23(b)(3), and a measure of damages that did not capture non-restitutionary damages in compliance with California law. Pet. App. 40, 60–65.

Pursuant to the 14-day deadline in Federal Rule of Civil Procedure 23(f), Lambert's deadline to petition for permission to appeal the District Court's decertification order expired on March 6, 2015. Although nothing prevented Lambert from doing so, he did not petition for permission to appeal by the March 6 deadline.

Instead, at a status conference on March 2, 2015, Lambert requested permission to file a "renewed motion for class certification." Pet. App. 71. The District Court denied Lambert's request. The District Court acknowledged, however, that Lambert could file a motion for reconsideration pursuant to the Central District of California's local rules. *Id.* at 73–76. In fact, Lambert did not need the District Court's permission to file a motion for reconsideration—he could have filed the motion for reconsideration at any time under the applicable local rules. *See* C.D. Cal.

L.R. 7–18. After discussing the case schedule, the District Court set a March 12, 2015 deadline for Lambert to file his motion for reconsideration. Pet. App. 73–76.

During the status conference, Lambert did not mention that he was contemplating petitioning for permission to appeal under Rule 23(f). *Id.* at 68–77. There is no evidence in the record that Lambert even considered filing a Rule 23(f) petition before his motion for reconsideration was denied. Consequently, when the District Court set a March 12 deadline on Lambert's motion for reconsideration, the Rule 23(f) deadline had not been raised and was not at issue.

Ultimately, Lambert filed his motion for reconsideration on March 12, 2015. The District Court denied the motion on June 24, 2015. Pet. App. 27.

On July 8, 2015, Lambert finally filed a Rule 23(f) petition for permission to appeal with the Ninth Circuit. JA17. The petition was filed more than four months after the deadline set by Rule 23(f) expired.

On July 20, 2015, Nutraceutical timely filed its opposition to Lambert's Rule 23(f) petition. JA39. Among other arguments, Nutraceutical objected to Lambert's Rule 23(f) petition as untimely. JA41 ("The petition at issue here is time-barred and should be denied for that reason alone.").

On September 16, 2015, a Ninth Circuit motions panel conditionally granted Lambert's petition and instructed the parties "[i]n addition to all other issues they wish to raise in their briefs in the appeal, to . . . address the timeliness of this petition." *Lambert v.*

Nutraceutical Corp., 870 F.3d 1170, 1175 (9th Cir. 2017) (alterations omitted).

The case was then assigned to a Ninth Circuit merits panel. In its answering brief, Nutraceutical again objected to Lambert's Rule 23(f) petition as untimely. JA103 ("The Rule 23(f) petition underlying this appeal is time-barred by the Federal Rules of Civil Procedure, and the appeal should be denied for that reason alone.").

The Ninth Circuit heard oral argument on March 9, 2017. On September 15, 2017, the Ninth Circuit issued an opinion holding that Lambert's Rule 23(f) petition was timely. Reaching the merits of the appeal, the Ninth Circuit reversed the District Court's decertification order and remanded the case.

The Ninth Circuit conceded that "[u]nder the plain text of Rule 23(f), Lambert's petition would be untimely because it was not filed within fourteen days of the district court's initial order decertifying the class." *Lambert*, 870 F.3d at 1176. Nevertheless, the court held that equitable exceptions applied. The Ninth Circuit reached that decision in three steps:

First, the Ninth Circuit held that Rule 23(f) is a non-jurisdictional, claim-processing rule. *Id.* at 1177. *Second*, the Ninth Circuit held that a motion for reconsideration filed *within* Rule 23(f)'s 14-day deadline will toll the deadline. *Id.* at 1177–78. The Ninth Circuit recognized, however, that Lambert's motion for reconsideration did not satisfy this exception because it was filed after the Rule 23(f) deadline had expired. *Id.* at 1178. *Third*, the Ninth Circuit held that equitable exceptions also apply. Citing *Bowles v.*

Russel, 551 U.S. 205, 211–14 (2007),[2] the Ninth Circuit concluded that "[w]hen deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations." *Lambert*, 870 F.3d at 1177.

The Ninth Circuit went on to adopt broad equitable exceptions to the Rule 23(f) deadline. The court held that the availability of equitable exceptions in each case depends on "equitable factors such as whether the litigant 'pursued his rights diligently,'" "whether external circumstances, such as a deadline imposed by the district court, affected the litigant," and "whether [the] litigant took some other action similar to filing a motion for reconsideration within the 14-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action." *Id.* at 1178 (footnote and citation omitted).

Applying those factors, the Ninth Circuit held that Lambert equitably tolled the Rule 23(f) deadline because he "informed the court orally of his intention to seek reconsideration of the decertification order and the basis for his intended filing within 14 days of the decertification order and otherwise acted diligently, and because the district court set the deadline for filing

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[2] The Ninth Circuit erroneously relied on *Bowles*. That case did not hold that equitable exceptions apply to claim-processing rules. Rather, *Bowles* held that equitable exceptions do not apply to jurisdictional rules. *Bowles*, 551 U.S. at 211–14. Contrary to the Ninth Circuit's decision, and as explained further below, this Court has consistently recognized under circumstances nearly identical to this case that the plain language of claim-processing rules can preclude equitable exceptions.

a motion for reconsideration with which Lambert complied." *Id.* at 1179.

SUMMARY OF ARGUMENT

Mandatory claim-processing rules are "unalterable" if a party "properly raise[s] them." *Eberhart v. United States*, 546 U.S. 12, 15, 19 (2005) (citation omitted); *see also Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017). There is no dispute here that Rule 23(f)'s 14-day deadline to petition for permission to appeal an order granting or denying class certification is a mandatory claim-processing rule. Nor is there any dispute that Nutraceutical timely objected when Lambert filed an untimely Rule 23(f) petition. JA41. Accordingly, the Ninth Circuit had a "duty to dismiss the appeal." *Eberhart*, 546 U.S. at 18.

Rather than dismiss the appeal, the Ninth Circuit applied a broad and unprecedented equitable exception to permit it. Citing *Bowles*, 551 U.S. at 211–14, the Ninth Circuit assumed that all claim-processing rules—despite their mandatory and unalterable nature—are subject to equitable exceptions. *Lambert*, 870 F.3d at 1177 ("When deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations.").

Bowles did not reach that conclusion. Nor has any other decision of this Court. To the contrary, this Court's precedent demonstrates that the plain language set forth in mandatory claim-processing rules can preclude equitable exceptions. For example, this Court has repeatedly recognized that mandatory claim-processing rules written in "emphatic form" are

unsusceptible to equitable exceptions. *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) (collecting cases).

Carlisle v. United States, 517 U.S. 416 (1996) and *United States v. Robinson*, 361 U.S. 220 (1960) demonstrate this point. In those cases, this Court held that Federal Rule of Criminal Procedure ("Criminal Rule") 45(b) precluded equitable exceptions to claim-processing deadlines. At the time, Criminal Rule 45(b) allowed courts to extend most deadlines for "excusable neglect," but it expressly prohibited extensions of the deadlines at issue in *Carlisle* and *Robinson*. Finding that "[t]here is simply no room in the text" of Criminal Rule 45(b) for equitable exceptions, the *Carlisle* court held that Criminal Rule 45(b) barred an extension even where "the defendant was legally innocent" or the late filing was a result of "attorney error." 517 U.S. at 421, 419. Likewise, the *Robinson* court held that Criminal Rule 45(b) precluded an extension for "excusable neglect." 361 U.S. at 221–22 n.1, 230.

Just like Criminal Rule 45(b), the rules governing the time to file a Rule 23(f) petition create a strict and unyielding deadline that precludes equitable exceptions. Rule 23(f) requires a petition to be filed within 14 days of a district court's order, and Federal Rule of Appellate Procedure ("Appellate Rule") 5(a)(2) makes clear that the petition "must" be filed within that time.

Moreover, Appellate Rule 26(b) expressly prohibits courts from extending the Rule 23(f) deadline. It provides that courts may extend most deadlines "[f]or good cause," however a "court *may not* extend the time to file . . . *a petition for permission to appeal*." Fed. R. App. P. 26(b) (emphasis added). Appellate Rule 26(b)

is therefore nearly identical to Criminal Rule 45(b), which *Carlisle* and *Robinson* applied to preclude equitable exceptions to the claim-processing rules at issue in those cases.

Appellate Rule 2 also prohibits courts of appeals from suspending Appellate Rule 26(b)'s limitations. Fed. R. App. P. 2 ("[A] court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules . . . except as otherwise provided in Rule 26(b)."). It is difficult to imagine more "emphatic" language than the combined textual force of Rule 23(f) and Appellate Rules 5(a)(2), 26(b), and 2.

In light of the above, every other Court of Appeals to consider this issue has refused to recognize the kind of exception to the Rule 23(f) deadline that the Ninth Circuit created. *See, e.g.*, *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 193–94 & nn.5–6 (3d Cir. 2008); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004) ("This court cannot disregard the plain meaning of [the] provisions [found in Rule 26(b)(1)]." (alterations in original) (citations omitted)); *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.").

The Ninth Circuit's failure to do the same requires reversal. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) ("[F]ederal courts have no more discretion to disregard the [federal rules] than they do to disregard constitutional or statutory provisions."); *see also Carlisle*, 517 U.S. at 430 (stating that courts may not "ignore the mandate" of the federal rules "in order to obtain 'optimal' policy results").

While the Ninth Circuit's violation of the foregoing federal rules, by itself, requires reversal, there are numerous other reasons why the decision below is erroneous and should be reversed:

First, the Ninth Circuit's adoption of broad equitable exceptions is inconsistent with the very purpose behind Rule 23(f): to reduce the delay, disruption, and waste of judicial resources caused by interlocutory appeals by establishing a deliberately short 14-day filing window. *See* Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment ("The [14]-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings."); *Gary v. Sheahan*, 188 F.3d 891, 893 (7th Cir. 1999) ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small."). The Ninth Circuit's decision undermined that goal by applying broad equitable exceptions.

Second, the Ninth Circuit created considerable uncertainty in the law as to the timeliness of future Rule 23(f) petitions by replacing a simple, bright-line rule with an impractical standard. Under the Ninth Circuit's rule, appellate courts will need to consider "whether a litigant took some other action similar to filing a motion for reconsideration within the 14-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration." *Lambert*, 870 F. 3d at 1178. As explained herein, this vague standard is difficult to apply, unpredictable, and unnecessary.

Third, there is no substantial need for equitable exceptions in this context. A litigant who misses the Rule 23(f) deadline does not suffer any uniquely harsh consequences because class-certification decisions remain appealable following final judgment. *See* 28 U.S.C. § 1291. Filing a Rule 23(f) petition is also not an inherently difficult or complicated process. And regardless, parties in class-action proceedings are typically represented by competent counsel who are engaged in the litigation, receive notice of a district court's order on class certification, and can marshal their arguments to file a Rule 23(f) petition within 14 days.

Even if *some* equitable exceptions could apply to the Rule 23(f) deadline, the decision below must be reversed because the exceptions the Ninth Circuit created are inconsistent with the limits this Court has imposed. This Court's precedent is clear that equitable exceptions apply only "where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control," *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016), or where the litigant has relied on a "specific assurance" from a court that he can initiate an appeal at a later date, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989).

The broad equitable exceptions the Ninth Circuit adopted contain no similar requirement. In this case, nothing prevented Lambert from filing a timely Rule 23(f) petition. Nor did the District Court represent that Lambert could petition to appeal the decertification order at a later date. Lambert simply failed to follow the applicable rules. His failure does

not even qualify as "excusable neglect," which this Court has held is not sufficient to excuse an untimely filing. *Menominee Indian Tribe*, 136 S. Ct. at 757.

Finally, to the extent Lambert argues that his motion for reconsideration restarted the Rule 23(f) deadline, he is incorrect because there is no dispute that his motion was filed *after* the Rule 23(f) deadline had passed. The motion was therefore untimely under both this Court's precedent and that of every Court of Appeals to consider the issue. *See United States v. Healy*, 376 U.S. 75, 77–78 (1964) ("[A] timely petition for rehearing by the Government filed *within the permissible time for appeal* renders the judgment not final for purposes of appeal until the court disposes of the petition." (emphasis added)); *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) ("[T]he courts of appeal uniformly require that a motion to reconsider be filed within [14] days if it is going to toll the . . . period within which to seek permission to appeal.").

ARGUMENT

I. CLAIM-PROCESSING RULES LIKE RULE 23(f) ARE MANDATORY AND MUST BE ENFORCED WHEN PROPERLY INVOKED

It is undisputed that Nutraceutical objected to Lambert's Rule 23(f) petition as untimely and maintained that objection throughout the Ninth Circuit proceedings. JA41, 103. As explained below, the Ninth Circuit had a "duty to dismiss the appeal" under these circumstances. *Eberhart*, 546 U.S. at 18; *see also id.* ("[W]hen the Government objected to a filing [as] untimely under Rule 37, the court's duty to dismiss the appeal was mandatory."); *Manrique*, 137 S. Ct. at 1272.

Recently, this Court has taken steps to clarify the difference between jurisdictional and mandatory claim-processing rules. As this Court explained in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 16–17 (2017), "a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time," while "a time limit prescribed only in a court-made rule . . . is, instead, a mandatory claim-processing rule."

The distinction matters because failure to comply with a jurisdictional deadline "deprives a court of adjudicatory authority over the case, necessitating dismissal." *Id.* at 17. A jurisdictional defect cannot be waived or forfeited, is not subject to equitable exceptions, and the court has a duty to raise it *sua sponte* at any time. *Id.*; *see also Bowles*, 551 U.S. at 214–15. As a result, jurisdictional defects can cause harsh consequences. *See Henderson v. Shinseki*, 562

U.S. 428, 435 (2011) ("[M]any months of work on the part of the attorneys and the court may be wasted.").

It does not follow, however, that mandatory claim-processing rules lack all of the attributes of a jurisdictional rule. *See Gutierrez*, 523 F.3d at 198 ("Although the time limit in Rule 23(f) is claims-processing rather than jurisdictional, it is clearly a strict and inflexible time limit."); Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 3–6 (2008).

The purpose of a claim-processing rule is "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 562 U.S. at 435. That purpose is best served when a rule is applied consistently and strictly according to its text.

This Court has therefore held that if a claim-processing rule is timely raised, the rule is "unalterable," and the court's duty to enforce it is "mandatory." *Manrique*, 137 S. Ct. at 1271; *Hamer*, 138 S. Ct. at 17 ("If properly invoked, mandatory claim-processing rules must be enforced."); *Kontrick*, 540 U.S. at 456 (explaining that claim-processing rules are "unalterable on a party's application"). This approach minimizes the harsh consequences of a jurisdictional rule—*e.g.*, dismissal for lack of subject matter jurisdiction after significant litigation activity has taken place—while otherwise promoting efficiencies and finality by encouraging parties to strictly follow the federal rules.

For example, this Court held in *Eberhart* that Criminal Rule 33(b)(2), which establishes the deadline to file a motion for a new trial for any reason other

than newly discovered evidence, is a claim-processing rule, and that such rules are "unalterable on a party's application." 546 U.S. at 15 (quoting *Kontrick*, 540 U.S. at 456). In other words, "[t]hese claim-processing rules . . . assure relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 19.

This Court reaffirmed *Eberhart*'s holding in *Manrique* and held that a rule requiring a party to file a notice of appeal of an amended judgment is "at least a mandatory claim-processing rule." 137 S. Ct. at 1271. Because the government had raised the petitioner's failure to comply with this rule, this Court held that the lower "court's duty to dismiss the appeal was ***mandatory***." *Id.* (emphasis added).

II. THE NINTH CIRCUIT ERRONEOUSLY ADOPTED EQUITABLE EXCEPTIONS TO THE RULE 23(f) DEADLINE

Despite the above, the Ninth Circuit did not dismiss Lambert's untimely Rule 23(f) petition. Instead, the Ninth Circuit held that Rule 23(f), and all other claim-processing rules, are subject to judge-made equitable exceptions. *Lambert*, 870 F.3d at 1177 ("When deadlines are not jurisdictional, courts may apply judicial equitable exceptions to avoid or soften the time limitations."). For the reasons herein, the Ninth Circuit's holding is inconsistent with this Court's long-standing precedent and contravenes the very purpose of an interlocutory appeal deadline.

A. CLAIM-PROCESSING RULES CAN PRECLUDE EQUITABLE EXCEPTIONS

Although this Court has "reserved" whether claim-processing rules are subject to equitable exceptions, *Hamer*, 138 S. Ct. at 18 n.3, its longstanding precedent demonstrates that at least some are not. This Court has consistently recognized that the plain language of claim-processing rules can preclude equitable exceptions. That is particularly true where, as here, the rule is written in "emphatic" form. *Kontrick*, 540 U.S. at 458 (collecting cases).

In *Robinson*, for example, this Court held that a notice of appeal filed after the deadline in former Criminal Rule 37(a)(2) was untimely even though the late filing was due to "excusable neglect." 361 U.S. at 221–222, 230. This Court reached that conclusion because the language of the relevant rules precluded the possibility that equitable exceptions could apply. In particular, Criminal Rule 45(b) at the time allowed courts to extend most deadlines for "excusable neglect," however it provided that "the court may not enlarge . . . the period for taking an appeal." *Id.* at 223.[3] As

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[3] When *Robinson* was decided, Rule 45(b) provided as follows: "Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal." *Robinson*, 361 U.S. at 223.

Robinson held, that language is "quite plain and clear." *Id.* at 224.[4]

Similarly, in *Carlisle* this Court held that certain equitable exceptions could not apply where the petitioner had filed a motion for judgment of acquittal one day after the deadline in Criminal Rule 29(c). 517 U.S. at 418, 421. The district court had excused the untimely filing (and reversed the petitioner's conviction) because refusal to do so would result in a "grave injustice." *Id.* at 419. After the Sixth Circuit reversed, the petitioner argued that courts have the power to excuse an untimely filing when, *inter alia*, "there is a claim that the defendant was legally innocent" or "the motion was not timely filed because of attorney error." *Id.* This Court rejected that argument.

Noting that Criminal Rule 45(b) generally allowed extensions of deadlines for "good cause," but prohibited extensions of the deadline in Criminal Rule 29(c), this Court held that "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion is accompanied by a claim of legal innocence . . . or was filed late because of attorney error." *Id.* at 421.

More recently, this Court affirmed the principle that *Robinson* and *Carlisle* stand for: that mandatory claim-

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[4] Although *Robinson* has been criticized for referring to the appeal deadline in that case as "mandatory and jurisdictional," this Court, as explained below, has expressly approved of and consistently cited *Robinson* for the rule that Nutraceutical relies on here: that courts "must observe the clear limits of [the federal rules] when they are properly invoked." *Eberhart*, 546 U.S. at 17.

processing rules in "emphatic form" "preclude equitable exceptions." *Kontrick*, 540 U.S. at 458. In *Kontrick*, this Court held that Federal Rules of Bankruptcy Procedure 4004(a) and (b) and 9006(b)(3), which contain deadlines for a creditor to object to a debtor's discharge, are mandatory claim-processing rules. *Id.* at 458. While *Kontrick* did not decide whether those rules are subject to equitable exceptions, it cited both *Robinson* and *Carlisle*, and expressly recognized that the issue of whether equitable exceptions could apply depends on "whether the time restrictions in th[e] rules are in such emphatic form as to preclude equitable exceptions." *Id.* at 458 (alteration in original) (citations omitted).

And one year later, in *Eberhart*, this Court applied *Robinson* and *Carlisle* again to hold that Criminal Rule 33(b)(2) is a mandatory claim-processing rule and therefore "unalterable on a party's application." 546 U.S. at 15 (quoting *Kontrick*, 540 U.S. at 456). In so holding, *Eberhart* adopted and clarified *Robinson's* reasoning.[5] This Court explained that "*Robinson* is correct not because the District Court lacked *subject-matter jurisdiction*, but because district courts *must observe* the clear limits of the Rules of Criminal Procedure when they are properly invoked." *Id.* at 17 (second emphasis added); *see also Hamer*, 138 S. Ct. at 21 n.11. This Court further recognized "the central point of the *Robinson* case–that when the Government

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[5] As in *Robinson* and *Carlisle*, the rule at issue in *Eberhart* was governed by Criminal Rule 45(b)'s express prohibition against extensions of time. *Eberhart*, 546 U.S. at 13 ("This deadline is rigid. The Rules provide that courts 'may not extend the time to take any action under [Rule 33], except as stated' in Rule 33 itself. Rule 45(b)(2)." (alterations in original)).

objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was *mandatory*." *Eberhart*, 546 U.S. at 18 (emphasis added); *see also id.* (approving *Carlisle's* holding that "a court may not grant a postverdict motion for judgment of acquittal that is untimely under Federal Rule of Criminal Procedure 29(c) *when the prosecutor objects*").[6]

These cases demonstrate that judges do not have discretion to alter or ignore plain language in the federal rules. *Bank of Nova Scotia*, 487 U.S. at 255 (explaining that the federal rules are "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the [a federal rule's] mandate than they do to disregard constitutional or statutory provisions").

As *Robinson* explained:

> That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision.

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[6] This Court has reached the same conclusion in numerous other cases and held that the language used to define a procedural deadline precluded equitable exceptions. *See, e.g.*, *United States v. Brockamp*, 519 U.S. 347, 350–52 (1997) (holding that the "unusually emphatic" language, detail, and "the explicit listing of exceptions," demonstrate that other equitable exceptions are not available); *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 31 (1989).

361 U.S. at 229; *see also Carlisle*, 517 U.S. at 430 (explaining that courts may not "ignore the mandate" of the federal rules "in order to obtain 'optimal' policy results"); *Delta Airlines*, 383 F.3d at 1145 ("This court cannot disregard [the] plain meaning of the provisions found in [Appellate Rule] 26(b)(1)." (first alteration in original) (citation omitted)).

B. THE FEDERAL RULES PRECLUDE EQUITABLE EXCEPTIONS TO THE RULE 23(f) DEADLINE

As discussed, this Court's long-standing precedent demonstrates that claim-processing rules can preclude equitable exceptions. The deadline to petition for permission to appeal under Rule 23(f) falls within this category. As in *Robinson* and *Carlisle*, the relevant federal rules—Rule 23(f) and Appellate Rules 5(a)(2), 26(b), and 2—use clear and "emphatic" language that preclude equitable exceptions. *Kontrick*, 540 U.S. at 458.

1. Rule 23(f) and Appellate Rule 5(a)(2) are Strict and Mandatory

When interpreting a federal rule, this Court looks first and foremost to its text. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989). Rule 23(f) states "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule *if* a petition for permission to appeal *is filed* with the circuit clerk *within 14 days* after the order is entered." Fed. R. Civ. P. 23(f) (emphasis added). The word "if" imposes a prerequisite to an interlocutory appeal—a petition filed "within 14 days after the order is entered." *Id.*

Appellate Rule 5(a)(2) reinforces this requirement.[7] That rule—titled "Petition for Permission to Appeal"—states: "the petition *must* be filed within the time specified by the statute or rule authorizing the appeal." Fed. R. App. P. 5(a)(2) (emphasis added). As this Court has recognized, the word "must" is "unmistakably mandatory [in] character." *Hewitt v. Helms*, 459 U.S. 460, 471 (1983), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *see also* Bryan Garner, *A Dictionary of Modern Legal Usage* 941 (2d ed. 1995) ("*Must* . . . means 'is required to.'").

2. Appellate Rule 26(b) Expressly Prohibits Extending the Rule 23(f) Deadline

If Rule 23(f) and Appellate Rule 5(a)(2) leave any doubt that courts lack discretion to extend the Rule 23(f) deadline, Appellate Rule 26(b) conclusively demonstrates that they cannot.[8] It states:

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[7] Appellate Rule 5 was amended effective December 1, 1998, in anticipation of the adoption of Rule 23(f). *See* Minutes of the Meeting of the Advisory Committee on Appellate Rules, April 15, 1996, at 11, *available at* http://www.uscourts.gov/sites/default/files/fr_import/AP0496.pdf.

[8] "[T]he appellate rules control the filing of a Rule 23(f) petition." *Delta Airlines*, 383 F.3d at 1145; *see also In re Veneman*, 309 F.3d 789, 793 (D.C. Cir. 2002) ("[W]e agree that the Federal Rules of Appellate Procedure govern the filing of Rule 23(f) petitions."); *Beck v. Boeing Co.*, 320 F.3d 1021, 1023 (9th Cir. 2003); *Lienhart v. Dryvit Sys. Inc.*, 255 F.3d 138, 142, n.1 (4th Cir. 2001); *see also supra* note 7 (explaining that Appellate Rule 5 was amended to apply to Rule 23(f) petitions).

> (b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. ***But the court may not extend the time to file***:
>
> > (1) a notice of appeal (except as authorized in Rule 4) or ***a petition for permission to appeal***.

Fed. R. App. P. 26(b)(1) (emphasis added).

Notably, Appellate Rule 26(b) is nearly identical to Criminal Rule 45(b), which this Court analyzed in *Robinson* and *Carlisle* and concluded was unsusceptible to equitable exceptions. At the time, Criminal Rule 45(b) provided that courts could extend most time periods "if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal." *Robinson*, 361 U.S. at 223 (quoting Fed. R. Crim. P. 45(b)). Because the language of Criminal Rule 45(b) was "quite plain and clear," the *Robinson* court held that it precluded an extension for "excusable neglect," 361 U.S. at 221–222, 224, and the *Carlisle* court held that it precluded exceptions for "attorney error" or where "the defendant was legally innocent," 517 U.S. at 419; *see also Eberhart*, 546 U.S. at 13 ("This deadline is rigid. The Rules provide that courts may not extend the time to take any action under [Rule 33], except as stated in Rule 33 itself." (alteration in original) (citations omitted)).

The parallels here are compelling. Like Criminal Rule 45(b), Appellate Rule 26(b) provides that "[f]or

good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court *may not extend the time to file . . . a petition for permission to appeal*." Fed. R. App. P. 26(b) (emphasis added). In fact, both Appellate Rule 26(b) and Criminal Rule 45(b) are patterned on similar language in Federal Rule of Civil Procedure 6(b). *Kontrick*, 540 U.S. at 456 n.10.[9] Simply put, if the language in Criminal Rule 45(b) precluded equitable exceptions in *Robinson* and *Carlisle*, the same must be true of Appellate Rule 26(b).[10]

Every other Court of Appeals to consider this issue has reached the same conclusion and applied Appellate Rule 26(b) to reject untimely Rule 23(f) petitions. *See Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013) (rejecting Rule 23(f) petition that was filed late as a result of counsel's mistake because Appellate Rule 26(b)(1) "clearly states that this Court cannot extend the time for filing a petition for permission to appeal");

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[9] Rule 6(b) expresses the "view that there should be a definite point where it can be said a judgment is final" and "the right method" is "to list in Rule 6(b) the various other rules whose time limits *may not be set aside*." Fed. R. Civ. P. 6 advisory committee's note to 1946 amendment (emphasis added). Following its adoption, federal courts consistently defined the limits in Rule 6(b) as jurisdictional and therefore non-extendable. *See Robinson*, 361 U.S. at 229. Appellate Rule 26(b) was drafted against this backdrop and with the same intent. *See id.* (explaining that the drafters of Criminal Rule 45(b) must have been aware of Rule 6(b) "and of the judicial construction it had received").

[10] Indeed, this Court previously referred to Appellate Rule 26(b) as creating a "mandatory and jurisdictional" deadline. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988).

Delta Airlines, 383 F.3d at 1145 (rejecting Rule 23(f) petition filed late as a result of attorney error, holding "[t]he Federal Rules of Appellate Procedure specifically foreclose appellate courts from granting an extension of time to file a petition for permission to appeal"); *Fleischman*, 639 F.3d at 31 ("[T]his Court is expressly barred from extending the time to file a petition for permission to appeal.").

The Third Circuit applied Appellate Rule 26(b) to reject an untimely Rule 23(f) petition in a situation that closely resembles the facts in this case. The petitioners in *Gutierrez* did not file a Rule 23(f) petition or a motion for reconsideration before the Rule 23(f) deadline expired. 523 F.3d at 191. Instead, they requested, by letter, an extension of time to file a motion for reconsideration before the Rule 23(f) deadline had expired, the district court granted the request, and the petitioners filed a Rule 23(f) petition within ten days of the order denying their motion for reconsideration. *Id.* Unlike the Ninth Circuit, the Third Circuit rejected the petitioners' argument that the district court's scheduling order could extend the time to file a Rule 23(f) petition. *Id.* at 194. Citing Appellate Rule 26(b), the Third Circuit held that "[a] district court may not . . . enlarge the time to file a Rule 23(f) petition." *Id.* at 193 n.5; *see also id.* at 194 n.6.

3. Appellate Rule 2 Reinforces the Prohibition Against Extending the Rule 23(f) Deadline

While the prohibition in Appellate Rule 26(b) is clear and well-established, Appellate Rule 2 provides even more evidence that the Rule 23(f) deadline is non-extendable. Appellate Rule 2 states:

> On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, *except as otherwise provided in Rule 26(b).*

Fed. R. App. P. 2 (emphasis added).

Appellate Rule 2 "contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result," however that exception cannot apply to Appellate Rule 26(b) because Appellate Rule 26(b) "prohibits a court of appeals from extending the time for taking appeal or seeking review." Fed. R. App. P. 2 advisory committee's note to 1967 adoption. Appellate Rule 2 therefore further demonstrates that Appellate Rule 26(b) precludes equitable exceptions to the Rule 23(f) deadline.

This Court has applied Appellate Rule 2 to hold that Appellate Rule 26(b) is non-extendable. In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988), the question presented was whether courts could excuse a notice of appeal that did not identify all appellants in accordance with Appellate Rule 3(c). After explaining that Appellate Rule 2 and Appellate Rule 26(b) "forbid[] a court to 'enlarge' the time limits for filing a notice of appeal," this Court held that no exceptions could apply because "[p]ermitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal." *Id.* at 315; *see also Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1231 (11th Cir. 2007) (holding that

Appellate Rule 2 and 26(b) "explicitly forbid us from suspending, even for good cause, the time requirements" for filing a petition for permission to appeal).

In sum, multiple federal rules explicitly prohibit courts from extending the Rule 23(f) deadline. That prohibition applies even in the face of "good cause," Fed. R. App. P. 26(b), or "manifest injustice," Fed. R. App. P. 2 advisory committee's note to 1967 adoption. It is difficult to imagine more "emphatic" language precluding equitable exceptions. *See Kontrick*, 540 U.S. at 458; *see also Robinson*, 361 U.S. at 224 (enforcing deadline despite excusable neglect because the rule's language was "quite plain and clear"); *Carlisle*, 517 U.S. at 421 (same).

Nevertheless, the Ninth Circuit impermissibly ignored the plain language of the federal rules and adopted equitable exceptions to the Rule 23(f) deadline that did—and in future cases will—extend the time to petition for permission to appeal. That error warrants correction by this Court.

C. THE NINTH CIRCUIT'S DECISION CONTRAVENES THE PURPOSE BEHIND THE RULE 23(f) DEADLINE

The Ninth Circuit's decision also contravenes the express purpose of the Rule 23(f) deadline: to reduce the disruption and delay caused by interlocutory appeals. Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment.

It is well-established that deadlines governing the time for filing an appeal should be strictly enforced. In the past, this Court categorically defined appeal

deadlines as "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (citation omitted); *see also Bowles*, 551 U.S. at 209 n.2 ("[T]ime limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century.").

The need for a mandatory, inflexible deadline is even more pronounced in the context of interlocutory appeals like those authorized by Rule 23(f). "[I]nterlocutory appeals are generally disfavored as disruptive, timeconsuming, and expensive for both the parties and the courts, and the more so in a complex class action where the district court may reconsider and modify the class as the case progresses." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 105 (D.C. Cir. 2002) (citations omitted).

For this reason, appellate courts generally only review final judgments. *See* 28 U.S.C. § 1291. The final judgment rule serves several important interests:

> It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

Flanagan v. United States, 465 U.S. 259, 263–64 (1984); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (stating that interlocutory appeals "undermine[] efficient judicial administration and encroach[] upon the prerogatives of district court

judges, who play a special role in managing ongoing litigation") (citations omitted); *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (stating that the final judgment rule "minimizes the harassment and delay that would result from repeated interlocutory appeals").

Although Rule 23(f) creates an exception to the final judgment rule, that exception is intentionally narrow. To address and reduce the problems created by interlocutory appeals, Rule 23(f) created a "deliberately small" 14-day filing window. *Gary*, 188 F.3d at 893. As the advisory committee notes explain, "the [14]-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment[11]; *see also Fleischman*, 639 F.3d at 31 (recognizing "Rule 23(f)'s aim of providing an opportunity for interlocutory appeal, but confining that opportunity within narrow limits, so as to avoid disruption and delay to the proceedings below"); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005) ("Although Rule 23(f) expands opportunities to appeal certification decisions,

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[11] The advisory committee minutes demonstrate that this limit was important to the drafters and thoroughly discussed. *See* Minutes of the Advisory Committee on Civil Rules, November 9 and 10, 1995 at 3–4, *available at* http://www.uscourts.gov/sites/default/files/fr_import/min-cv11.pdf ("The limits built into the draft were noted repeatedly throughout the discussion. Application for permission to appeal must be made within 10 days of the order granting or denying certification. . . . [T]he danger of delay is reduced not only by the draft requirement that permission to appeal be sought within 10 days, but also by the prospect that the courts of appeals generally will act quickly, likely within 30 days or so, in deciding whether to grant permission.").

the drafters intended interlocutory appeal to be the exception rather than the rule.").

For this reason, every other Court of Appeals to consider this issue has recognized that the Rule 23(f) deadline is "strict and mandatory." *See, e.g.*, *Gutierrez*, 523 F.3d at 199 ("We stress that Rule 23(f)'s time limit for filing a motion to reconsider is a strict and mandatory time period, for Rule 23(f) creates a (brief) opportunity for expedited review." (citation omitted)); *Gary*, 188 F.3d at 893 ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small."); *Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1290 (11th Cir. 2007) ("[T]he . . . deadline provides a single window of opportunity to seek interlocutory review, and that window closes quickly to promote judicial economy."); *Fleischman*, 639 F.3d at 31 ("It is well-established that Rule 23(f)'s 14 day filing requirement is a rigid and inflexible restriction." (citation omitted)); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014) ("The 'rigid and inflexible' nature of this deadline is 'well-established.'" (citation omitted)); *In re DC Water & Sewer Auth.*, 561 F.3d 494, 495 (D.C. Cir. 2009).

Splitting from its sister circuits, the Ninth Circuit disregarded the concerns noted above and instead adopted broad equitable exceptions. The Ninth Circuit based its holding on the assumption that interlocutory appeals under Rule 23(f) are not generally disruptive and slow. *Lambert*, 870 F. 3d at 1180 ("The premise that Rule 23(f) petitions are disruptive and slow is not

universally true and we decline to adopt any hard and fast rule on the basis of such an idea.").

That assumption is directly contrary to the express purpose of Rule 23(f), *see* Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment, and the unanimous authority discussed above—both from this Court and other Courts of Appeals—that recognizes the delay and disruption caused by interlocutory appeals. Indeed, even other decisions from the Ninth Circuit itself recognize that "[i]nterlocutory appeals are generally disfavored because they are disruptive, time-consuming, and expensive." *Chamberlan*, 402 F.3d at 959 (citation omitted).

The Ninth Circuit's assumption is also demonstrably false. The only reason a court would apply equitable exceptions to the Rule 23(f) deadline is to allow an appeal that was not initiated on time. It is beyond dispute that applying equitable exceptions to the Rule 23(f) deadline will allow late appeals and further delay the appellate process and district court proceedings.

In fact, delay is even more likely given the broad and vague equitable standards the Ninth Circuit adopted. Specifically, the Ninth Circuit held that a litigant can toll the Rule 23(f) deadline by simply "conveying an intent" to file a motion for reconsideration. *Lambert*, 870 F.3d at 1178. Under that lenient and vague rule, litigants have little incentive to comply with the Rule 23(f) deadline or diligently pursue petitions for permission to appeal within 14 days of a district court's order. Instead, litigants can preserve their right to appeal by simply writing a letter or orally informing the district court

that they *intend* to file a motion for reconsideration. District courts may see an influx of such communications, which could add months to the already significant delays associated with Rule 23(f) petitions.

The specific reasons the Ninth Circuit gave for its decision do not compel a different conclusion:

First, the court noted that Rule 23(f) petitions do not automatically stay district court proceedings. While that may be true, it is not a reason to create further delay. *See Blair v. Equifax Check Servs.*, 181 F.3d 832, 835 (7th Cir. 1999) (noting that the lack of an automatic stay provision demonstrates that "Rule 23(f) is drafted to avoid delay").

Moreover, although a stay is not automatic, Rule 23(f) allows either the district court or the Court of Appeals to enter a stay of the proceedings in the district court pending the appeal. *See* Fed. R. Civ. P. 23(f). It is unlikely that the district courts—which have increasingly heavy dockets—will continue to litigate a case and potentially waste judicial resources while an appeal is pending. In this case, the District Court entered a stay that has lasted nearly three years. JA9.

Stays are particularly likely in this context because an order on class certification can significantly affect the parties' economic incentives. Where, as here, a district court has decertified the class, the class plaintiffs must proceed on an individual basis. Under these circumstances, class plaintiffs have little economic incentive to proceed and will likely request a stay. The same is true for class-action defendants. If

a class is certified, many defendants will prefer to file an appeal and seek a stay rather than risk liability on a class-wide basis.

Second, the Ninth Circuit reasoned that "Rule 23(f) petitions may lengthen litigation. But so do motions for reconsideration of a class action decertification decision when no 23(f) petition is filed, which every circuit to consider the question has treated as valid grounds for equitable tolling." *Lambert*, 870 F.3d at 1181.

That is irrelevant. Even assuming a motion for reconsideration filed before the Rule 23(f) deadline can restart the time to file a Rule 23(f) petition, *see infra* section IV, it does not follow that courts should further extend the deadline—as the Ninth Circuit did—by applying equitable exceptions to motions for reconsideration filed *after* 14 days.

Third, the Ninth Circuit stated that "Rule 23(f) petitions do not uniquely disrupt or inject uncertainty into the litigation." *Lambert*, 870 F.3d at 1181. But as discussed above, it is well-recognized that interlocutory appeals do cause uncertainty. The mere possibility of an appellate court reversing a decision on class certification will cause uncertainty as to the status of the case during district court proceedings.

More importantly, the Ninth Circuit's decision has created considerable uncertainty as to how the Rule 23(f) deadline applies and the timeliness of future petitions. The Ninth Circuit replaced a simple, bright-line rule with a vague and impractical standard. Courts now must consider "whether a litigant took some other action similar to filing a motion for reconsideration within the fourteen-day deadline, such

as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action." *Lambert*, 870 F. 3d at 1179. That subjective standard is ambiguous, difficult to apply in practice, and unnecessary.

It will also create even more uncertainty in the law. As this Court is aware, equitable tolling issues are highly fact-dependent, and under the Ninth Circuit's standard, courts will be forced to decide whether a verbal representation at a status conference, a letter, or a call to the clerk's office, was sufficient to toll the Rule 23(f) deadline. In short, this Court should not "adopt a construction of Rule 23(f) that would regularly require mental gymnastics just for the purpose of giving litigants a second bite at the interlocutory-appellate-review apple." *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006).

The Ninth Circuit's reliance on the District Court's briefing schedule will also require courts to consider whether a petitioner has complied with a district court's schedule, which defeats the very purpose of having a uniform federal deadline. For example, local rules governing motions for reconsideration vary across the district courts. The Central District of California has no deadline, while the Southern District of California requires motions for reconsideration to be filed within 28 days. *Compare* C.D. Cal. L.R. 7–18, *with* S.D. Cal. Civil L.R. 7.1(i)(2). *See also* N.D. Cal. Civil L.R. 7–9(a) (requiring leave of court); D. Ariz. LRCiv 7.2(g)(2) (14-day deadline). Under the Ninth Circuit's decision, courts must now also take the local rules (and their differences) into account.

For these reasons, the Ninth Circuit's decision violates Rule 23(f)'s express purpose by causing even further delay, disruption, uncertainty, and waste of resources. It is also important to note that the Ninth Circuit's broad equitable exceptions apply to all non-jurisdictional deadlines. *Lambert*, 870 F.3d at 1177. Accordingly, the problems created by the Ninth Circuit's decision in the Rule 23(f) context may well spread to other areas.

D. THERE IS NO NEED FOR EQUITABLE EXCEPTIONS TO THE RULE 23(f) DEADLINE

Historically, courts have justified creating equitable exceptions to ensure fairness to litigants who—through no fault of their own—would otherwise have no opportunity to obtain judicial relief. *Rudin v. Myles*, 781 F.3d 1043, 1055 (9th Cir. 2015) ("[T]he purpose of equitable tolling is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having [her] day in court." (alteration in original) (citation omitted)); *see also Holland v. Florida*, 560 U.S. 631, 650 (2010).

Consider, for example, a statute of limitations. Failure to comply with a limitations deadline may completely bar a party from obtaining any judicial relief. Accordingly, courts have traditionally applied equitable tolling to limitations periods if the relevant statutory language permits. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990); *Holland*, 560 U.S. at 645–46.

These justifications for creating equitable exceptions simply do not apply to the Rule 23(f)

deadline. Rigid application of the Rule 23(f) deadline does not create the same harsh consequences because a Rule 23(f) petition is not the only opportunity to obtain appellate review of an order granting or denying class certification. Even when no Rule 23(f) petition has been filed, a party is fully entitled to appeal the district court's certification order after final judgment. *See* 28 U.S.C. § 1291; *Jenkins*, 491 F.3d at 1292 ("Our decision does not leave the employees without an avenue for relief. They can appeal the denial of class certification following the entry of a final judgment."). The Rule 23(f) deadline is therefore fundamentally different than other contexts where equitable exceptions have been applied.

Courts have also applied equitable exceptions to alleviate the harsh application of the law when a litigant is unsuspecting or unsophisticated. *See Sebelius v. Auburn Regional Med. Ctr.*, 568 U.S. 145, 160 (2013) (stating that equitable tolling has been applied to statutory schemes "in which laymen, unassisted by trained lawyers, initiate the process" (citations omitted)).

This justification also does not apply to the Rule 23(f) context. Parties to a class action are typically represented by competent counsel who are familiar with the relevant rules and deadlines. Indeed, class counsel must be appointed by the court only after a diligent scrutiny of their adequacy and competency. *See* Fed. R. Civ. P. 23(g)(1). Thus, the concerns that have motivated courts to adopt equitable exceptions to protect unsuspecting or unsophisticated litigants are not applicable here. *See Hallstrom*, 493 U.S. at 28 (rejecting equitable exceptions, in part, because the

class of suits at issue are "generally filed by trained lawyers who are presumed to be aware of statutory requirements"); *see also Sebelius*, 568 U.S. at 160 (rejecting equitable exceptions, in part, because the appeals at issue were initiated by "sophisticated" parties "assisted by legal counsel" who had "notice of the [relevant] regulations").

Relatedly, the Rule 23(f) deadline is not a uniquely difficult deadline to satisfy. Filing a petition for permission to appeal is not a complicated or momentous event like the initiation of a lawsuit; rather, the parties are already actively engaged in litigation and are closely monitoring the district court's decision on class certification.

The scope of appellate review on a Rule 23(f) petition is also narrow: did the district court abuse its discretion in granting or denying class certification? *Lambert*, 870 F.3d at 1176. When the district court's order is entered, the petitioner has the information he needs to appeal, including the evidence and arguments presented to the district court and the district court's order. There is no reason why competent counsel and parties cannot marshal their arguments and petition for permission to appeal within 14 days of the district court's order.

Even if this Court were to disagree and conclude that equitable exceptions to the Rule 23(f) deadline are necessary, "that policy question . . . must be resolved through the rule-making process and not by judicial decision." *Robinson*, 361 U.S. at 229; *see also Carlisle*, 517 U.S. at 430 (explaining that courts may not "ignore the mandate" of the federal rules "in order to obtain 'optimal' policy results").

III. THE DECISION BELOW REQUIRES REVERSAL EVEN IF EQUITABLE EXCEPTIONS COULD APPLY

Even if equitable exceptions could apply to the Rule 23(f) deadline, the exceptions the Ninth Circuit adopted are overly broad and inconsistent with the governing standards this Court has established. Critically, equitable exceptions apply only where an external obstacle outside the litigant's control caused the untimeliness. Here, nothing prevented or misled Lambert from filing a timely Rule 23(f) petition.

A. EQUITABLE EXCEPTIONS APPLY ONLY WHERE AN EXTERNAL OBSTACLE CAUSED THE UNTIMELINESS

As is relevant here, this Court has applied two equitable exceptions to excuse untimely filings: (1) equitable tolling and; (2) the doctrine of unique circumstances. Each exception requires that an external obstacle caused the litigant to miss the relevant deadline.

1. Equitable Tolling

Equitable tolling applies to certain statutes of limitations, including the deadline in the federal habeas corpus statute. *See Holland*, 560 U.S. at 634. But "a petitioner is entitled to equitable tolling only if he shows . . . that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 649 (citation omitted); *see also Menominee Indian Tribe*, 136 S. Ct. at 756 ("We therefore reaffirm that the second prong of the equitable tolling test is met only where the circumstances that caused a litigant's

delay are both extraordinary and beyond its control."); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Cal. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017).

Accordingly, this Court has refused to apply equitable tolling where no extraordinary circumstance prevented a timely filing. In *Menominee Indian Tribe*, for example, equitable tolling did not apply where the petitioners had mistakenly relied on a district court's order in another case. 136 S. Ct. at 757 ("This mistake was fundamentally no different from 'a garden variety claim of excusable neglect.'" (citation omitted)). And in *Lawrence*, this Court rejected an argument that a mistake made by an incarcerated petitioner's counsel could give rise to equitable tolling. 549 U.S. at 336 ("Attorney miscalculation is simply not sufficient to warrant equitable tolling.").

2. The Doctrine of Unique Circumstances

The doctrine of unique circumstances requires a litigant to satisfy an even higher burden.[12] It applies only if—unlike here—the party invoking it has relied on a "specific assurance" from a court that an appeal can be initiated at a later date. *Osterneck*, 489 U.S. at 179; *see also Carlisle*, 517 U.S. at 435 (Ginsburg, J., concurring) ("That exception covers cases in which the

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[12] *Bowles* held that the doctrine of unique circumstances does not apply to jurisdictional rules. 551 U.S. at 213. *Bowles* explained that the doctrine is rarely applied and has been in a "40-year slumber." *Id.* 214. Even assuming *arguendo* that the doctrine survives and could apply to claim-processing rules, the Ninth Circuit's adoption of far broader standards must be reversed.

trial judge has misled a party who could have—and probably would have—taken timely action had the trial judge conveyed correct, rather than incorrect, information.").

In *Thompson v. Immigration & Naturalization Service*, for example, the petitioner filed an untimely motion for a new trial, yet the district court mistakenly declared that the motion was made "in ample time." 375 U.S. 384, 385 (1964), *overruled generally by Bowles*, 551 U.S. at 214. As a result, the petitioner waited until his motion for a new trial was denied before he filed a notice of appeal. In that case, this Court held that the doctrine of unique circumstances applied since the petitioner, in reliance on the district court's statement and former Federal Rule of Civil Procedure 73,[13] believed that the deadline to file a notice of appeal would not run until his motion for a new trial was denied. *Id.* at 385–86

By contrast, this Court held in *Osterneck* that the doctrine of unique circumstances did not apply where no court had "ever affirmatively represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such assurance from [a] court." 489 U.S. at 178–79 (citation omitted). This Court distinguished *Thompson*, holding that the doctrine "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific

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[13] In pertinent part, Federal Rule of Civil Procedure 73 provided that the time to appeal would not run until "the entry of any of the following orders made upon a timely motion under such rules: . . . denying a motion for a new trial under Rule 59." *Thompson*, 375 U.S. at 385.

assurance by a judicial officer that this act has been properly done." *Id.*; *see also Carlisle*, 517 U.S. at 435 (Ginsburg, J., concurring) (explaining that the doctrine of unique circumstances did not apply because "Carlisle's counsel was not misled by any trial court statement or action; rather, he neglected to follow plain instructions").

B. THE NINTH CIRCUIT ADOPTED OVERLY BROAD AND IMPROPER EQUITABLE EXCEPTIONS

Here, the Ninth Circuit adopted a standard much broader than any equitable exception this Court has recognized. Pursuant to the Ninth Circuit's decision, courts must "look to equitable factors such as whether the litigant 'pursued his rights diligently,'" "whether external circumstances, such as a deadline imposed by the district court, affected the litigant," and "whether [the] litigant took some other action similar to filing a motion for reconsideration within the 14-day deadline, such as a letter or verbal representation conveying an intent to seek reconsideration and providing the basis for such action." *Lambert*, 870 F.3d at 1178 (footnote and citation omitted).

Absent from the Ninth Circuit's standard is any requirement that "the circumstances that caused a litigant's delay are both extraordinary and beyond its control." *Menominee Indian Tribe*, 136 S. Ct. at 756; *see also Holland*, 560 U.S. at 649. Nor is there any requirement in the Ninth Circuit's standard that a party rely on a "specific assurance" from a court that they can initiate an appeal at a later date. *Osterneck*, 489 U.S. at 179. As a result, the Ninth Circuit's standard will improperly provide relief to parties who

were not misled or prevented from making a timely filing, but instead failed to follow applicable rules.

That is precisely what happened in this case. No extraordinary circumstance stood in Lambert's way of filing a timely petition. Lambert could have easily filed a Rule 23(f) petition before the 14-day deadline had expired. Instead, he chose to pursue a motion for reconsideration, which he did not file until after the Rule 23(f) deadline had expired.

It is also beyond dispute that the District Court never gave Lambert a "specific assurance" that he could file a Rule 23(f) petition for permission to appeal at a later date. *Osterneck*, 489 U.S. at 179. In fact, the District Court had no idea that Lambert would file an interlocutory appeal. At the March 2, 2015, status conference, Lambert only requested permission to file a "renewed motion for class certification." Pet. App. 71. Lambert never mentioned an interlocutory appeal or the Rule 23(f) deadline at that status conference or at any other time before he filed his appeal. *See id.* at 68–77. In fact, there is no evidence in the record showing that Lambert or his counsel even considered filing an appeal before his motion for reconsideration was denied.

The Third Circuit in *Gutierrez* refused to apply equitable exceptions under facts far more favorable to the petitioners. *Gutierrez*, 523 F.3d at 198–99. There, the petitioners requested an extension of time to file a motion for reconsideration by letter. That letter also expressed petitioners' (mis)understanding that the extension "would not prejudice their ability to seek review of the denial of class certification." *Id.* at 198. Although the district court granted the extension, the

Third Circuit held that the doctrine of unique circumstances did not apply because the "District Court made no affirmative statements about the effect of the extension of time on Petitioners' ability to appeal to this Court." *Id.* at 199.

The same is true here. Lambert was not misled or prevented from filing a timely Rule 23(f) petition. He simply failed to follow the applicable rules.

Lambert's actions do not even constitute "excusable neglect," which this Court has held is insufficient to invoke equitable exceptions. *See Irwin*, 498 U.S. at 96 ("[T]he principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect."); *see also Menominee Indian Tribe*, 136 S. Ct. at 757; *Osterneck*, 489 U.S. at 179; *Eastman*, 736 F.3d at 677 ("Counsel's mistake or ignorance of the rules . . . is not a reason to accept an untimely Rule 23(f) petition.").

IV. LAMBERT'S MOTION FOR RECONSIDERATION DID NOT POSTPONE OR RESET THE RULE 23(f) DEADLINE

While this Court has held that a motion for reconsideration can postpone a deadline to appeal, that rule only applies if the motion is *timely* filed. *United States v. Dieter*, 429 U.S. 6, 8 (1976) ("[T]he consistent practice in civil and criminal cases alike has been to treat *timely* petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending." (emphasis added)).

In this context, a motion for reconsideration is "timely" only if it is filed *before* the deadline to appeal expires. *Healy*, 376 U.S. at 77–78 ("[A] timely petition

for rehearing by the Government filed *within the permissible time for appeal* renders the judgment not final for purposes of appeal until the Court disposes of the petition." (emphasis added)); *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (motion filed before 30-day appeal deadline in Appellate Rule 4(b) had expired); *Dieter*, 429 U.S. at 7 (same); *see also United States v. Lefler*, 880 F.2d 233, 234 (9th Cir. 1989) (explaining that *Dieter* and *Healy* require a motion for reconsideration to be filed before the time to appeal expires).

Following this Court's reasoning, every Court of Appeals to consider the effect of a motion for reconsideration on the Rule 23(f) deadline, including the Ninth Circuit below, has held that only a *timely* motion for reconsideration—*i.e.*, one filed within the 14-day window in Rule 23(f)—can toll the deadline. *Blair*, 181 F.3d at 837 ("[A] motion for reconsideration tolls the time for appeal, provided that the motion is made within the time for appeal."); *Gutierrez*, 523 F.3d at 193 ("We stress that, for the purpose of tolling the time within which to file a Rule 23(f) petition, a 'timely' motion to reconsider is one that is filed within the [14]-day period set forth in Rule 23(f)."); *Gary*, 188 F.3d at 892 ("[I]f the request for reconsideration is filed more than [14] days after the order . . . then appeal must wait until the final judgment."); *McNamara*, 410 F.3d at 281; *Nucor Corp.*, 760 F.3d at 343; *Carpenter*, 456 F.3d at 1191; *Fleischman*, 639 F.3d at 31; *Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1064 (11th Cir. 2001); *Lambert*, 870 F.3d at 1178.

Here, there is no dispute that Lambert's motion was filed *after* the Rule 23(f) deadline had expired.

Specifically, it is undisputed that Lambert did not file a motion for reconsideration until March 12, 2015, even though the 14-day deadline under Rule 23(f) expired on March 6. The motion for reconsideration was therefore untimely, and, under the law discussed above, could not have tolled or restarted the Rule 23(f) deadline.

CONCLUSION

The Ninth Circuit's decision to excuse Lambert's untimely Rule 23(f) petition and apply equitable exceptions to all claim-processing rules is inconsistent with this Court's precedent, violates the federal rules' prohibition against extending the time to file a Rule 23(f) petition, and contravenes the purpose behind the Rule 23(f) deadline. This Court should reverse.

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No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORPORATION,
Petitioner,

v.

TROY LAMBERT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Ten days after the district court decertified a class action, Respondent Troy Lambert orally informed the district court at a status conference—on the record—that he intended to file a written motion for reconsideration, and outlined the reasons why reconsideration was warranted. Lambert then filed his written motion for reconsideration when instructed by the district court—20 days after the decertification order—within the time permitted by Federal Rule of Civil Procedure 59(e). Fourteen days after the district court denied reconsideration, Lambert filed a petition for permission to appeal under Federal Rule of Civil Procedure 23(f). Did the Ninth Circuit correctly conclude that Lambert's Rule 23(f) petition was timely?

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STATEMENT

Petitioner Nutraceutical Corporation ("Nutraceutical") asks this Court to determine that Federal Rule of Civil Procedure 23(f) is insusceptible to equitable exceptions, and therefore find that Respondent Troy Lambert's ("Lambert") appeal to the Ninth Circuit should not have been addressed on the merits. Pet. Br. 16-37. Nutraceutical's argument, however, is premised on the incorrect assumption that the timing of Respondent Troy Lambert's ("Lambert") petition for permission to appeal violated Rule 23(f) in the first instance. *See* Pet. for Cert. 3 (stating that Lambert "fail[ed] to timely file a Rule 23(f) petition or a motion for reconsideration within the fourteen-day window"); Pet. for Cert. 6 (stating that "Lambert did not file a petition or a motion for reconsideration by [March 6, 2015]"); Pet. for Cert. 7 (stating that Lambert's petition for permission to appeal was "filed more than four months late"). But Nutraceutical is incorrect, because its theory hinges entirely on the erroneous premise that Lambert's reconsideration motion was untimely.

In fact, after the district court entered an order decertifying this class action, Lambert timely presented an oral motion for reconsideration to the district court at a status conference on March 2, 2015—10 days after the original decertification order—and followed up with a written motion for reconsideration on March 12, 2015, 20 days after the original decertification order. Lambert's request for reconsideration was therefore timely under the Federal Rules. *See* Fed. R. Civ. P. 7(b)(1) (providing that an oral motion can be made at a hearing); Fed. R. Civ. P. 59(e) (providing that "[a]

motion to alter or amend a judgment" can be filed "no later than 28 days after the entry of the judgment"); *see also* Fed. R. Civ. P. 54(a) (defining "judgment" as "any order from which an appeal lies"); Fed. R. Civ. P. 23(f) (providing for "an appeal from an order granting or denying class-action certification"). In addition to being timely under the plain language of the Federal Rules, Lambert's reconsideration motion was also filed within the time set by the district court. Because Lambert's reconsideration motion and appeal were timely under any standard, the Ninth Circuit properly granted permission to appeal and proceeded to the merits.

The relevant facts are as follows. In 2013, Lambert, on behalf of himself and others similarly situated, filed suit alleging that Nutraceutical violated California consumer fraud law with the sale of its Cobra Sexual Energy pill. Pet. App. 53. The case involves Nutraceutical's sale of a purported aphrodisiac claiming to contain "Horny Goat Weed" and a "Stimulating Brazilian herb known as 'potency wood.'" JA65; JA144. In 2014, the district court granted class certification. Pet. App. 28. The class was limited to people who purchased Nutraceutical's products in California on or after August 14, 2009. Pet. App. 53. After the initial district judge's retirement and the case's reassignment, Nutraceutical moved to decertify on a number of grounds. Pet. App. 4.

On February 20, 2015, the district court granted the motion, rejecting some of Nutraceutical's arguments, but agreeing that the plaintiff had failed to accumulate evidence sufficient to calculate restitution under California law. Pet. App. 4. At a status conference on

March 2, 2015—10 days later—Lambert asked the district court to recertify the class, outlining the product-pricing evidence that was already in the record in Nutraceutical's filed but unresolved motion for summary judgment. Pet. App. 5; Pet. App. 14; Pet. App. 71-76. The district court then granted leave for Lambert to file a motion for reconsideration and set a briefing and hearing schedule for that motion, requiring that Lambert file his motion by March 12, 2015. Pet. App. 76; Dist. Ct. Rec. 178. Nutraceutical raised no objection to this schedule. In accordance with the district court's order and Federal Rule of Civil Procedure 59(e), Lambert filed the motion for reconsideration on March 12, 2015, the date set by the district court, and 20 days after the decertification order. Pet. App. 5; JA5-6; Dist. Ct. Rec. 183.

On June 24, 2015, the district court denied Lambert's motion for reconsideration. Pet. App. 27-51. The district court recognized the reconsideration motion as a motion under Rule 59(e), and invoked the Rule 59(e) standards in deciding the motion. Pet. App. 29-31. Although it did not recertify the class as Lambert hoped, the district court did modify its prior order based on one of Lambert's arguments: that the decertification order erred by not providing for notice of decertification to the class. Pet. App. 49-50. Fourteen days later, Lambert petitioned the Ninth Circuit for permission to appeal under Rule 23(f), which was granted. JA17-38; JA60-61. After briefing and oral argument, the Ninth Circuit: (i) concluded that the appeal was timely; and (ii) reversed the district court's decertification because it misapplied California authorities on restitution under the state Unfair Competition Law. Pet. App. 1-26. Nutraceutical now

seeks this Court's review of the Ninth Circuit's timeliness conclusion, but does not challenge the Ninth Circuit's decision on the merits.

SUMMARY OF ARGUMENT

Nutraceutical's argument is premised on the assumption that Lambert's Rule 23(f) appeal could be deemed timely only if equitable tolling were applicable. While the Ninth Circuit was correct in finding that equitable tolling was appropriate under the circumstances, it need not have reached the issue because Lambert's appeal was timely under the plain language of the Federal Rules.

First, in at least three independent ways, Lambert timely sought reconsideration of the district court's decertification order. Lambert's March 2, 2015 oral request for the district court to revisit its February 20 decertification order (along with his reasons for so requesting) constituted a Rule 59(e) oral motion under Federal Rule of Civil Procedure 7(b)(1). Moreover, Lambert's March 12, 2015 written motion for reconsideration was filed well within the 28-day timeframe for filing a motion under Federal Rule of Civil Procedure 59(e). Under this Court's longstanding case law, such timely motions for reconsideration cause the deadline to appeal to run from the date that the district court disposes of the reconsideration motion—not the date of the original decision. Additionally, Federal Rule of Civil Procedure 23(c)(1)(C) provides that a certification decision "may be altered or amended before final judgment." The district court's June 24, 2015 denial of reconsideration "altered or amended" its previous order by both discussing in more detail the reasons for

decertification, and also by correcting the prior order's failure to provide for notice of decertification. Pet. App. 50; *see also* Pet. App. 6 (recognizing that "the [reconsideration] order set forth a plan for notifying the class regarding decertification"). Because Lambert's petition for permission to appeal was filed on July 8, 2015—within 14 days of the district court's June 24, 2015 denial of reconsideration—the appeal was timely without the need to invoke any equitable exceptions.

Second, the Federal Rules and this Court's longstanding case law—as well as case law from the courts of appeals—confirm that nonjurisdictional claim-processing rules in the Federal Rules are generally subject to equitable exceptions such as equitable tolling. As this Court has long recognized, and as the history of the Federal Rules shows, the Federal Rules are designed to facilitate disposition of cases on the merits. Indeed, the Federal Rules are heavily based upon procedures that were historically followed in courts of equity, which recognized the importance of equitable tolling. The Rules reflect this history, requiring that they be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Recognizing equitable tolling is entirely consistent with this mandate.

Nutraceutical argued in its certiorari petition that nonjurisdictional claim-processing rules are categorically insusceptible to equitable exceptions. Pet. for Cert. 16 ("Although this Court has not squarely addressed whether mandatory claim-processing rules are subject to equitable exceptions, its precedent

suggests that they are not."). Now, apparently recognizing that the Federal Rules were intended to be applied flexibly, Nutraceutical has abandoned this absolute position. Pet. Br. 17 ("Although this Court has 'reserved' whether claim-processing rules are subject to equitable exceptions . . . its longstanding precedent demonstrates that at least some are not."). Instead, Nutraceutical argues only that Civil Rule 23(f) is not subject to equitable exceptions. But Nutraceutical's arguments are based on a misreading of the Federal Rules and this Court's precedents.

Contrary to Nutraceutical's arguments, nothing in the Federal Rules precludes Rule 23(f) from being read to permit equitable tolling. Nutraceutical's heavy reliance on Appellate Rule 26(b)—which provides that a court may not "extend" the time to petition for permission to appeal—is misplaced. In relying so heavily on this prohibition, Nutraceutical entirely ignores that the application of equitable tolling to Rule 23(f) does not constitute an "extension" of the deadline. Rather, it simply recalibrates the date from which the 14-day deadline begins to run. Nothing in Rule 26(b) prohibits this. Moreover, even if the application of equitable tolling were viewed as giving a putative appellant additional time to petition for permission to appeal, Nutraceutical ignores that Rule 26(b) expressly draws a sharp distinction between: (i) "extending" a deadline; and (ii) permitting an act to be done after the expiration of the deadline. Rule 26(b) prohibits only the former. Because the application of equitable tolling at most permits an act to be done after expiration of what the deadline otherwise would be, equitable tolling is entirely consistent with Rule 26(b). Accordingly, the Ninth Circuit's decision in no way violates the

Appellate Rule 26(b). For the same reason, the Ninth Circuit's decision comports with Appellate Rule 2, which simply provides that Rule 26(b) cannot be suspended. The Ninth Circuit's decision is also consistent with the remainder of the Federal Rules, which make clear when a provision is to be applied unyieldingly. Rule 23(f) is not such a provision.

Third, Nutraceutical incorrectly argues that the Ninth Circuit inappropriately analyzed the equities in the facts of this case. As an initial matter, this factbound argument is not fairly included in the Question Presented, and therefore should not be considered. Regardless, Nutraceutical is mistaken. Nutraceutical does not genuinely dispute that had the district court set a 14-day deadline for filing a motion for reconsideration (which Nutraceutical concedes would have caused the deadline to appeal to run from the disposition of the reconsideration), Lambert would have filed his motion by that deadline. Moreover, this Court has long held that an appeal should be considered on the merits if a party relies on a district court's erroneous assurances regarding the timeliness of a motion that would otherwise suspend the time to appeal. These precedents continue to apply to nonjurisdictional time limits such as Rule 23(f).

In sum, Lambert's appeal was timely under the plain language of the Federal Rules, so it is unnecessary to decide whether Rule 23(f) is subject to equitable considerations such as equitable tolling. But even if the Court disagrees on this antecedent issue, the text and history of the Federal Rules unmistakably demonstrate that Rule 23(f) can be subject to equitable tolling. Simply put, the Ninth Circuit's judgment

represents a straightforward and correct application of this Court's precedents and the Federal Rules. Therefore, the Ninth Circuit's judgment should be affirmed.

ARGUMENT

I. Lambert's Appeal Was Timely Under the Federal Rules and This Court's Longstanding Precedents

Nutraceutical's argument is premised on the assumption that the timing of Lambert's appeal violated Rule 23(f). But this assumption is incorrect. *First*, at a status conference held 10 days after the district court's decertification order, Lambert orally presented the district court with reasons why the class should be recertified. This presentation constitutes an oral motion under the Federal Rules of Civil Procedure. Therefore, even under Nutraceutical's apparent view that a reconsideration motion must be filed within 14 days of the decertification order in order to postpone the period to seek appellate review under Rule 23(f), Lambert's appeal was timely. *Second*, Lambert's written motion for reconsideration was filed 20 days after the decertification order, and was therefore timely under Federal Rule of Civil Procedure 59(e). Under the Federal Rules and this Court's precedents, such a timely motion causes the time to appeal to run from the disposition of the reconsideration motion, not from the original order. Because Lambert's appeal was filed within 14 days of the district courts' disposition of the reconsideration motion, the appeal was timely. *Third*, Federal Rule of Civil Procedure 23(c)(1)(C) provides that a certification decision "may be altered or amended before final judgment." The district court's

June 24, 2015 denial of reconsideration altered and expanded upon the original decertification order. Because Lambert's petition for permission to appeal was filed on July 8, 2015—within 14 days of the district court's June 24, 2015 order—the appeal was timely without the need to invoke any equitable exceptions.[1]

A. Lambert Timely Sought Reconsideration Under Federal Civil Rule 59(e) and Under the District Court's Order, Therefore Postponing the Time to Appeal Until After the District Court Disposed of the Reconsideration Motion

1. Lambert's Written and Oral Requests for Reconsideration Were Timely Under Rule 59(e)

The district court's February 20, 2015 decertification order constitutes a "judgment" within the meaning of the Civil Rules, because it is "an[] order from which an appeal lies." Fed. R. Civ. P. 54(a); *see also* Fed. R. Civ. P. 23(f) (providing that a court of appeals may permit "an appeal from an order granting or denying class-action certification"). And under Federal Rule of Civil Procedure 59(e), a party may move to alter or amend a judgment "no later than 28 days after the entry of the judgment." Fed. R. Civ.

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[1] In addition to being discussed in detail below, Lambert's Brief in Opposition explains the multiple reasons why equitable considerations need not be invoked in order to affirm the Ninth Circuit's judgment. Opp. 1-19.

P. 59(e).[2] Lambert's written motion for reconsideration was filed on March 12, 2015—20 days after the district court's decertification order, and therefore well within the 28-day timeframe set forth in Rule 59(e). Accordingly, as explained in more detail below, the motion for reconsideration postponed the time to appeal, and Lambert's appeal was therefore due within 14 days of the denial of the motion for reconsideration, and was filed within this time. Because Lambert's petition was filed on July 8, 2015—14 days after the denial of reconsideration—the Ninth Circuit's judgment should be affirmed.

A motion falls under Rule 59(e) "where it involves 'reconsideration of matters properly encompassed in a decision on the merits.'" *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989) (quoting *White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 451 (1982)). Here, Lambert's motion for reconsideration asked the district court to vacate its decertification order (i.e., the order giving rise to an interlocutory appeal under Rule 23(f)), and recertify the class. The motion for reconsideration was therefore a Rule 59(e) motion, and indeed, the district court recognized it as such. Pet. App. 29 (recognizing that "a motion for reconsideration brought within 28 days of the entry of judgment is treated as a motion under Rule 59(e)" and invoking the standards under Rule 59(e) in deciding Lambert's motion for reconsideration); *see also McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) (recognizing that a motion for reconsideration of

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[2] Before December 1, 2009, Rules 59(e) and 23(f) were both subject to a 10-day deadline.

an order denying class certification is a Rule 59 motion).

As many courts have recognized, Rule 59(e) applies not only to final judgments, but also to interlocutory orders from which an appeal could lie. The Ninth Circuit recognized as much during oral argument here, and at least twice suggested that Lambert's reconsideration motion was in accordance with Rule 59. Oral Argument at 2:36-38 and 14:15-36, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181. Additionally, the First Circuit held that a motion for reconsideration of an appealable interlocutory order constituted a Rule 59(e) motion because the underlying order was "an order from which an appeal lies" under Rule 54(a). *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7-8 (1st Cir. 2005). Accordingly, the First Circuit held the time to appeal ran from the disposition of the reconsideration motion, not from the date of the original order. *Id.* Other decisions are in accord. *See, e.g.*, *Auto Servs. Co. v. KPMG, LLP*, 537 F.3d 853, 856 (8th Cir. 2008) (noting that for purposes of Civil Rules 54(a) and 59(e) and Appellate Rule 4(a)(4)(A)(iv), a "'judgment' encompasses both a final judgment and an appealable interlocutory order"); *Robertson v. Monsanto Co.*, 287 F. App'x 354, 358 (5th Cir. 2008) (applying the definition of "judgment" set forth in Rule 54(a) to interlocutory appeals under Rule 23(f)); *Lichtenberg v. Besicorp Grp. Inc.*, 204 F.3d 397, 400-01 (2d Cir. 2000) (recognizing that a "judgment" under the Civil Rules encompasses both a final judgment and an appealable interlocutory order); *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989) (same); *Rodriguez v. Banco Cent.*, 790 F.2d

172, 175-76 (1st Cir. 1986) (finding that Rule 59(e) applies to interlocutory orders based on Rule 54(a) and noting that "[l]ittle purpose would be served in penalizing a party for requesting a district court to reconsider a disputed interlocutory ruling before attempting to take its grievance to the court of appeals"). Here, the district court's decertification order constitutes an "order granting or denying class-action certification" from which "[a] court of appeals may permit an appeal" and is therefore "an order from which an appeal lies." Fed. R. Civ. P. 23(f); Fed. R. Civ. P. 54(a). Lambert's motion for reconsideration of the decertification order therefore was a timely motion under Rule 59(e).

Additionally, Lambert, at the district court's status conference on March 2, 2015, orally outlined the reasons why the district court should recertify the class. Pet. App. 71-72. In other words, Lambert presented an oral motion seeking the district court's reconsideration of the decertification order under Rule 59(e). Oral motions are permitted if "made during a hearing or trial." Fed. R. Civ. P. 7(b)(1)(A). As the Ninth Circuit recognized, Lambert, at the March 2 hearing, "informed the court of his intention to file a motion for reconsideration" and "explained that he had a damages model and evidentiary support for it." Pet. App. 5; *see also* Pet. App. 13-14. Accordingly, even if this Court were to accept Nutraceutical's argument that Lambert's motion for reconsideration had to be filed within 14 days of the district court's decertification order (*see* Pet. Br. 43-45; Reply for Pet. 5) (which it should not, as explained below), Lambert's March 2, 2015 oral motion—made 10 days after the decertification order—was timely even under

Nutraceutical's proposed standard. The Ninth Circuit recognized the possibility that this oral explanation was an oral motion. Oral Argument at 2:55-3:21, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181.

Moreover, Lambert's reconsideration motion was timely because it was filed within the time expressly permitted by the district court. Specifically, the district court, at the March 2 status conference, gave Lambert until March 12, 2015 to file a motion for reconsideration. Pet. App. 75-76. In compliance with the district court's order, Lambert moved for reconsideration on March 12, 2015. JA5; Pet. App. 5. For this independent reason, Lambert's reconsideration motion was timely filed.

In sum, Lambert's reconsideration motion complied with the district court's order and with Civil Rule 59(e). Both of these reasons independently establish that Lambert's reconsideration motion was timely.

2. Because Lambert Filed a Rule 23(f) Petition Within 14 Days of the Denial of His Timely Filed Reconsideration Motion, the Appeal Was Timely

a. This Court's Longstanding Precedents Confirm that Lambert's Appeal Was Timely

Because Lambert timely moved for reconsideration, this Court's precedents dictate that the 14-day period for Lambert to file a Rule 23(f) petition began to run when the reconsideration motion was denied. This Court has long held that a timely filed motion for

reconsideration causes the time to appeal to run from the disposition of the reconsideration motion. For instance, in *United States v. Ibarra*, 502 U.S. 1 (1991), this Court summarily reversed the Tenth Circuit for: (i) concluding that a motion for rehearing did not toll the time to appeal; and (ii) dismissing the appeal as untimely. In particular, this Court recognized that in both civil and criminal cases, "a motion for rehearing . . . renders an otherwise final decision of a district court not final until it decides the petition for rehearing." *Ibarra*, 502 U.S. at 6. Under this rule, "district courts are given the opportunity to correct their own alleged errors, and allowing them to do so prevents unnecessary burdens being placed on the courts of appeals." *Id.* at 5. Indeed, it has been "the consistent practice in civil and criminal cases alike . . . to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending." *United States v. Dieter*, 429 U.S. 6, 8 (1976).

In recognizing this principle, this Court dismissed the Tenth Circuit's "concern with the lack of a statute or rule expressly authorizing treatment of a [reconsideration] motion as suspending the limitation period[,]" and instead concluded that it has been a "'traditional and virtually unquestioned practice'" for the time to appeal to run from the disposition of a timely reconsideration motion. *Id.* at 8, 8 n.3 (quoting *United States v. Healy*, 376 U.S. 75, 79 (1964)); *see also Healy*, 376 U.S. at 80 (recognizing "the ordinary rule" that an appeal need not be filed while a petition for rehearing is under consideration). Simply put, when a rehearing request is "duly and seasonably filed," the time to appeal "begins from the date of the denial of

either the [rehearing] motion or petition." *Morse v. United States*, 270 U.S. 151, 153-54 (1926) (citations omitted); *see also Aspen Mining & Smelting Co. v. Billings*, 150 U.S. 31, 36 (1893) (recognizing that when a reconsideration motion is timely filed, "the judgment or decree does not take final effect for the purposes of the writ of error or appeal"). Based on these precedents, Lambert's Rule 23(f) petition was timely because it was filed within 14 days of the district court's order denying reconsideration.

Nutraceutical's attempt to distinguish this Court's longstanding precedents (Pet. Br. 43-45) fails. In particular, Nutraceutical seizes on this Court's statement in *Healy* that a rehearing petition suspends the time to appeal if filed "within the permissible time for appeal." Nutraceutical Br. at 43-44 (citing *Healy*, 376 U.S. at 77-78). But in *Healy*, there was an "absence of any statute or rule governing the effect of rehearing petitions of the Government[.]" *Healy*, 375 U.S. at 79. Here, in sharp contrast, there is no such absence. Rather, Civil Rule 59(e) expressly provides for the filing of motions to alter or amend the judgment within 28 days of the challenged decision. Additionally, as explained in further detail below, Appellate Rule 4(a)(4)(A)(iv) expressly confirms that a timely Rule 59(e) motion suspends the time to appeal. Because Lambert filed his Rule 59(e) motion well within the 28-day period, the 14-day period to appeal did not begin to run until the district court disposed of the motion on June 24, 2015. Lambert's Rule 23(f) petition—filed within 14 days of June 24, 2015—therefore was timely.

This Court's treatment of the effect of rehearing petitions on the time to petition for certiorari further demonstrates that Lambert's appeal was timely. In one case, this Court concluded that a certiorari petition challenging the decision of the Guam Supreme Court was timely where: (i) the certiorari petition was filed within 90 days from the Ninth Circuit's dismissal for lack of jurisdiction after originally having agreed to exercise its discretion to entertain the appeal, even though (ii) the petition was not filed within 90 days of the Guam Supreme Court's decision. *Limtiaco v. Camacho*, 549 U.S. 483, 486-88 (2007). Because the pendency of a rehearing petition "rais[es] the question whether the [lower] court will modify the judgment and alter the parties' rights[,]" this Court recognized that "there is no 'judgment' to be reviewed" during the pendency of such a petition. *Hibbs v. Winn*, 542 U.S. 88, 98 (2004) (citing *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990)). Similarly here, Lambert's motion for reconsideration—filed within the time set by the district court and Civil Rule 59(e)—raised the question whether the district court would modify the decertification order, and therefore suspended the time for Lambert to appeal. Consequently, the 14-day period for Lambert to petition for permission to appeal under Rule 23(f) began to run on June 24, 2015—when the district court denied Lambert's timely filed motion for reconsideration. Lambert's July 8, 2015 Rule 23(f) petition—filed within 14 days of the denial of reconsideration—therefore was timely.

b. The Federal Rules Confirm that Lambert's Appeal Was Timely

The Federal Rules further demonstrate that Lambert's appeal was timely. Petitions for permission to appeal "must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by [Appellate] Rule 4(a) for filing a notice of appeal." Fed. R. App. P. 5(a)(2). Because Civil Rule 23(f) is silent as to the effect of reconsideration motions on the time to appeal, Appellate Rule 4(a) therefore must be consulted. Under Rule 4(a), "the time to file an appeal runs for all parties from the entry of the order disposing of" a Rule 59 motion. Fed. R. App. P. 4(a)(4)(A)(iv); *see also Gelder v. Coxcom Inc.*, 696 F.3d 966, 970-71 (10th Cir. 2012) (O'Brien, J., concurring) (recognizing that the timely filing of a motion listed in Appellate Rule 4(a)(4)(A) postpones the time to petition for permission to appeal under Rule 23(f)). As Judge O'Brien correctly explained, there is "no need" for Civil Rule 23(f) or Appellate Rule 5 to "speak to motions which might extend the time" to appeal "because [Appellate] Rule 5 specifically refers to [Appellate] Rule 4." *Id.* at 971. Therefore, Rule 4(a)(4)(A)(iv) controls here, and it dictates that Lambert's time to file a Rule 23(f) petition ran from June 24, 2015—when the district court denied his Rule 59(e) motion.

The applicability of Appellate Rule 4(a)(4)(A)(iv) to Civil Rule 23(f) petitions is especially clear because when the Federal Rules seek to preclude an appeal period from being postponed by motion listed in Rule 4(a)(4), they say so explicitly. For instance, in certain

bankruptcy appeals, "Rule[] 4(a)(4) . . . do[es] not apply[.]" Fed. R. App. P. 6(b)(1)(A). Rather, in those bankruptcy appeals, a rehearing motion suspends the time to appeal only if the motion is filed within the 14-day period permitted by Bankruptcy Rule 8022. Fed. R. App. P. 6(b)(2)(A)(i); Fed. R. Bankr. P. 8022(a). The Federal Rules contain no similar language with respect to Civil Rule 23(f) petitions, showing that a timely Rule 59(e) motion suspends the time to file a Rule 23(f) petition.

Because Lambert filed his reconsideration motion on March 12, 2015—well within the 28-day period following the district court's February 20, 2015 decertification order—the reconsideration motion was timely under Rule 59(e). The February 20 decertification order therefore did not become final until June 24, 2015, when it was reconsidered and amended. Consequently, the time to file a 23(f) petition did not begin to run until June 24, 2015. Accordingly, Lambert's July 8, 2015 23(f) petition—filed 14 days after the June 24 order—was timely. *See* Fed. R. Civ. P. 23(f) (providing that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered").

Because Lambert's appeal was timely under the Federal Rules and under this Court's longstanding precedents, the Ninth Circuit's decision can be affirmed on that basis. This case, therefore, "involves no issue of equitable tolling or any other equity-based exception." *Kontrick v. Ryan*, 540 U.S. 443, 457 (2004).

B. Lambert's Appeal Was Also Timely Based on the Plain Language of Rule 23

1. The District Court's Reconsideration Decision Altered the Previous Decertification Order

A certification decision "may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). The district court's initial decertification order (Pet. App. 27-51) was defective because it did not provide a plan for notice of class decertification. *See* Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(c)(3)(B). The district court's June 24, 2015 denial of reconsideration altered its previous order by addressing, as was required, notice to the class of the decertification. Pet. App. 50. Accordingly, because Lambert filed his Rule 23(f) petition for permission to appeal within 14 days of the district court's altered decertification order, the Rule 23(f) petition was timely, without the need to consider any equitable exceptions.

2. A Reconsideration Decision Triggers the 14-Day Period Under the Plain Language of Rule 23(f)

More broadly, the order denying reconsideration of the decertification simply falls into the category of "an order granting or denying class-action certification." Fed. R. Civ. P. 23(f). In substance, the motion, had it been granted, would have created a certified class that had been previously decertified. The district court denied the motion, so its order was thus "an order . . . denying class-action certification." *Id.* Because a Rule 23(f) petition for permission to appeal is due "within 14 days after the order [denying class-action certification]

is entered," *id.*, and Lambert's petition was filed on July 8, 2015—within that timeframe—Lambert's appeal was timely under the plain language of Rule 23(f). As squarely as the reconsideration order here falls within Rule 23(f)'s language, other Circuit Courts have applied it more expansively, to orders modifying the scope of the class, or decertifying a class. For instance, in *Glover v. Standard Fed. Bank*, 283 F.3d 953, 956-58 (8th Cir. 2002), the decision "granting or denying class-action certification" was an order that changed the class definition of an earlier-certified class.

It makes sense for a reconsideration order to trigger the 14-day time to file a Rule 23(f) petition, because initial class-certification decisions are often made early in the litigation, before the parties have had a chance to engage in discovery. Discovery often uncovers evidence that is probative of whether class certification is appropriate. Parties therefore should not be discouraged from: (i) seeking reconsideration after the factual record is fully developed; and (ii) filing a Rule 23(f) petition only after the district court's reconsideration order, when the court of appeals is in the best position to make an informed decision based on a complete record.

II. The Ninth Circuit Correctly Recognized that Nonjurisdictional Claim-Processing Rules Are Generally Subject to Equitable Exceptions

As explained in detail above, the timing of Lambert's appeal was in full compliance with the Federal Rules, thus the Court need not consider whether equitable exceptions can apply to nonjurisdictional claim-processing rules such as Rule

23(f). Nevertheless, the Ninth Circuit's recognition that such rules can be subject to equitable exceptions (*see* Pet. App. 10) is fully in accord with this Court's longstanding precedents and precedents from lower courts, which confirm that equitable exceptions can apply to nonjurisdictional claim-processing rules. None of Nutraceutical's cited cases—and none that Lambert could locate—hold to the contrary. Therefore, the judgment should be affirmed.

A. The History of the Federal Rules Demonstrates that the Rules Are Designed to Be Flexible and Subject to Equitable Exceptions

American jurisprudence has long treated time prescriptions as subject to equitable exceptions. This is most clear with respect to federal statutes of limitations, which this Court has long held are "normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland v. Florida*, 560 U.S. 631, 645-46 (2010) (emphasis in original) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)); *see also United States v. Wong*, 135 S. Ct. 1625, 1632-33 (2015) (recognizing, in interpreting a federal statute of limitations, that a filing deadline is a "quintessential claim-processing rule" that is subject to equitable tolling) (citation omitted). Equitable tolling is "a long-established feature of American jurisprudence derived from 'the old chancery rule[.]'" *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10-11 (2014) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)); *see also Bowen v. City of New York*, 476 U.S. 467, 479-80 (1986) (concluding that the 60-day time period for seeking judicial review of a Social Security Administration

adjudication was subject to equitable tolling); *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) (recognizing that a nonjurisdictional deadline was "subject to waiver, estoppel, and equitable tolling").

This Court has aptly described the flexible principles behind equitable tolling:

> [C]ourts of equity must be governed by rules and precedents no less than the courts of law. But we have also made clear that often the exercise of a court's equity powers ... must be made on a case-by-case basis. In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity[.] The flexibility inherent in equitable procedure enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct... particular injustices. Taken together, these cases recognize that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Holland, 560 U.S. at 649-50 (internal citations omitted). Given the Federal Rules' derivation from the rules of chancery, as explained in detail below, the

presumption in favor of equitable tolling applies equally to the Federal Rules.

In England, litigation historically took place in a two-court system: (i) "common law" or "law" courts; and (ii) "Chancery" or "equity" courts. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 914 (1987). Common-law courts had "countless pleading rules" that could cause parties to "easily lose on technical grounds." *Id.* at 917. Equity courts, in sharp contrast, could "relieve the petitioner from an alleged injustice that would result from rigorous application of the common law." *Id.* at 918. Early American jurisprudence was largely based on the common-law model. *Id.* at 926. Indeed, "[i]n 1789, equity either did not exist or was underdeveloped." *Id.* at 931.

In the nineteenth century, a movement began to introduce equitable principles into American jurisprudence. For example, New York adopted the Field Code of 1848, which "merged law and equity in addition to providing more general rules than the common law." *Id.* at 932. Although the Field Code differed in many respects from traditional English equity practice, the Code, among other things: (i) relaxed the common-law pleading standards by providing that pleadings be made in plain language; (ii) liberalized the opportunity for pleadings to be amended; and (iii) provided for discovery. *Id.* at 934. "The Field Code was adopted in about half the states, covering the majority of the country's population." *Id.* at 939. Although adopting multiple equitable principles, the Field Code differed from traditional

equity practice because it did not permit the same type of judicial discretion and legal flexibility that English equity practice allowed. *Id.* at 934.

Procedural reform also occurred in England in the nineteenth century, derived in some respects from the Field Code. *Id.* at 942-43. However, this procedural reform culminated with rules "that were both simpler and more liberal than the Field Code" and "push[ed] away from a dual common law/equity procedural system, to one looking primarily like equity[.]" *Id.* at 943. These changes "became a beacon for later American procedural reformers." *Id.* at 942.

In the early twentieth century, "[t]he legislative history of what eventually became the Federal Rules of Civil Procedure" began, "at about the time [this Court] was overhauling the equity rules in 1912." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1003 (4th ed. Apr. 2018 update). "The Equity Rules of 1912, now superseded by the Federal Rules of Civil Procedure, abolished the intricacies of former equity pleading and substituted a simple procedure that in some respects resembled code pleading but without the circumstantial minuteness of the latter." *Id.* § 1002. Shortly thereafter, Chief Justice Taft, through: (i) his opinion for the Court in *Liberty Oil Co. v. Condon Nat'l Bank*, 260 U.S. 235 (1922); and (ii) remarks before the American Bar Association; urged that law and equity be merged. *Id.* § 1003. This suggestion was ultimately taken. In 1934, Congress passed the Rules Enabling Act, which permitted this Court to "unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and

procedure for both[.]" Pub. L. No. 73-415, § 2, 48 Stat. 1064 (1934). The Federal Rules of Civil Procedure became operative in 1938. Henry P. Chandler, Some Major Advances in the Federal Judicial System 1922-1947, 31 F.R.D. 307, 512 (1962). They provided that the distinction between actions at law and actions at equity would no longer be made, and that there would instead be only one type of action: the "civil action." Fed. R. Civ. P. 2.

Although the Federal Rules of Civil Procedure effected a merger of law and equity, the Rules "were very largely based on the old equity rules." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1008 (4th ed. Apr. 2018 update). Indeed, "[t]he underlying philosophy of, and procedural choices embodied in, the Federal Rules were almost universally drawn from equity rather than common law. The expansive and flexible aspects of equity are all implicit in the Federal Rules." Subrin, 135 U. Pa. L. Rev. at 922. In certain matters, such as pleading, joinder, and discovery, the Federal Rules even "went beyond equity's flexibility and permissiveness." *Id.* In sum, "[t]he Federal Rules reflected a philosophy that the discretion of individual judges, rather than mandatory and prohibitory rules of procedure, could manage the scope and breadth and complexity of federal lawsuits better than rigid rules." Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash. L. Rev. 429, 473 (2003).

As demonstrated above, the history of the Federal Rules are heavily based on the rules of equity, and the Rules were designed to increase courts' discretion in individual cases. Given this close kinship between the

Federal Rules and chancery practice, time prescriptions in the Rules—like those in federal statutes of limitations—should be entitled to a presumption in favor of equitable tolling, a doctrine that is based on "'the old chancery rule.'" *Lozano*, 572 U.S. at 10-11 (quoting *Holmberg*, 327 U.S. at 397); *see also Holland*, 560 U.S. at 646 (noting that the presumption in favor of equitable tolling was "reinforced by the fact" that the underlying statutory scheme was governed by equitable principles); *Young v. United States*, 535 U.S. 43, 49-50 (2002) ("Congress must be presumed to draft limitations periods in light of this background principle."). In sum, given the strong connection of the Federal Rules to equitable principles, the Rules should presumptively be subject to equitable considerations such as tolling.

B. The Federal Rules Further Demonstrate that They Are to Be Interpreted Against the Backdrop of Equitable Principles

The text of the Federal Rules further confirms that they should be interpreted to accommodate equitable principles such as equitable tolling. Specifically, the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. As one commentator has recognized, Rule 1's provision for the "construc[tion]" of the Federal Rules "suggests some flexibility in interpreting the applicable language of the rules." Main, 78 Wash. L. Rev. at 499. Moreover, Rule 1's provision for the "administ[ration]" of the Rules "invites even more flexibility—suggesting a more fundamental or threshold inquiry into the relevance of

a Federal Rule." *Id.* (citing Black's Law Dictionary (6th ed. 1990) (defining "administer" as "to manage or conduct . . . discharge . . . [or] execute")). Accordingly, Rule 1 demonstrates that the Federal Rules are to be interpreted with principles of equity in mind—not in the unyielding manner that Nutraceutical seeks.

C. This Court's Precedents Demonstrate that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

This Court has long recognized equitable exceptions to provisions set forth in the Federal Rules. Especially illustrative is this Court's longstanding principle that a timely filed motion for reconsideration postpones the time to appeal, even when there is no "statute or rule expressly authorizing treatment of a [reconsideration] motion as suspending the limitation period[.]" *Dieter*, 429 U.S. at 8 n.3; *accord Ibarra*, 502 U.S. at 6; *Healy*, 376 U.S. at 80. The fact that this exception is so well-accepted by this Court—and has been for many decades—demonstrates that the Rules cannot be construed in the rigid and unyielding manner that Nutraceutical seeks.

Other decisions from this Court further demonstrate that the Rules are subject to equitable exceptions. For instance, in *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964), a party's motion for a new trial was belatedly filed, but the district court assured him that the motion was filed "in ample time." *Thompson*, 375 U.S. at 386. The party filed a notice of appeal within 60 days of the district court's disposition of the motion for a new trial, but not within 60 days of the original judgment. *Id.* at 384-86.

Had the motion actually been filed "in ample time," the time to file a notice of appeal would not have begun to run until the district court disposed of the motion. *Id.* at 385-86. However, because the motion was untimely, the filing of the motion did not toll the time to appeal. *Id.* The Seventh Circuit therefore dismissed the appeal as untimely. *Id.* at 387.

This Court reversed in view of the "unique circumstances" and directed the Seventh Circuit to consider the appeal on the merits. *Id.*; *see also Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 217 (1962) (recognizing the "unique-circumstance doctrine," an equitable exception to the notice-of-appeal timing requirement); *accord Osterneck*, 489 U.S. at 179; *Wolfsohn v. Hankin*, 376 U.S. 203, 203 (1964) (summarily reversing the dismissal of an appeal, based upon the reasoning in *Harris Truck Lines* and *Thompson*).

As one commentator noted, this Court recognizes the unique-circumstances doctrine as "an equitable basis upon which to reach the merits of an appeal" that, although untimely, should "be treated as timely because the appellant reasonably relied upon a district court's representation that the appeal period would be lengthier than it turned out to be." Philip A. Pucillo, *Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the "Unique Circumstances" Doctrine*, 82 Tul. L. Rev. 693, 701 (2007). Although this Court in *Bowles v. Russell*, 551 U.S. 205 (2007) overruled *Harris Truck Lines* and *Thompson* "to the extent they purport to authorize an exception to a jurisdictional rule," *Bowles* did not overrule *Harris Truck Lines* or *Thompson* as applied to nonjurisdictional time

prescriptions. *Bowles*, 551 U.S. at 214; *see also Mobley v. C.I.A.*, 806 F.3d 568, 577 (D.C. Cir. 2015) (citations omitted).[3] Indeed, the D.C. Circuit recently applied the unique-circumstances doctrine to excuse the untimely filing of a post-judgment motion. *Mobley*, 806 F.3d at 577-78;[4] *see also Khan v. U.S. Dep't of Justice*, 494 F.3d 255, 258-60 (2d Cir. 2007) (concluding that *Bowles* did not alter the ability of a court to recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950.1 (4th ed. Apr. 2018 update) (recognizing that a nonjurisdictional time period "should be subject in appropriate cases to the 'unique circumstances' doctrine").

Application of the unique-circumstances doctrine to nonjurisdictional time prescriptions is fully consistent with this Court's precedents. As Justice Ginsburg explained, this Court's decisions in *Thompson* and

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[3] As correctly concluded by the Ninth Circuit (and unchallenged by Nutraceutical), the 14-day deadline in Rule 23(f) is nonjurisdictional because it does not appear in a statute. Pet. App. 10; *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 (2017) (recognizing that time prescriptions appearing only in court-promulgated rules are nonjurisdictional); Fed. R. Civ. P. 82 (providing that the Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts").

[4] Although Fed. R. App. P. 4(a)(4)(A)—one of the Rules at issue in *Mobley*—was subsequently amended on December 1, 2016 to no longer permit untimely motions listed in Rule 4(a)(4)(A) to suspend the time to appeal, the relevant events here (i.e., the decertification order, the motion for reconsideration, and the Civil Rule 23(f) petition) all took place in 2015, and therefore are governed by the pre-2016 version of the Appellate Rules that was interpreted in *Mobley*.

Harris Truck Lines are "based on a theory similar to estoppel," and time limits found in the Federal Rules should be treated like "[t]ime requirements in lawsuits," which "are customarily subject to 'equitable tolling.'" *Carlisle v. United States*, 517 U.S. 416, 435-36 (1996) (Ginsburg, J., concurring) (quoting 4A Wright & Miller, Federal Practice & Procedure § 1168, at 501); *see also Bowles*, 551 U.S. at 216 (Souter, J., dissenting) (recognizing that nonjurisdictional time limitations "may be waived or mitigated in exercising reasonable equitable discretion[]").

This Court's decision in *Schacht v. United States*, 398 U.S. 58 (1970) is also instructive. There, the petitioner filed a petition for a writ of certiorari outside the time period permitted by the Rules of this Court, and the Government argued that the Court could not consider the merits of the petition because the time period in the Rules cannot be waived. *Schacht*, 398 U.S. at 63. Rejecting the Government's view, this Court explained that the time period to file a petition for a writ of certiorari in a criminal case is not a jurisdictional rule, and that the Rule "contains no language that calls for so harsh an interpretation." *Id.* at 63-64. Rather, the Court explained that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64; *see also Bowles*, 551 U.S. at 212.

These cases are also consistent with this Court's longstanding recognition that cases should not turn on notice-of-appeal technicalities. For instance, in rejecting the notion that a defect in a notice of appeal was fatal to the appeal, this Court concluded that "[i]t is too late in the day and entirely contrary to the spirit

of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1962). Similarly, although Appellate Rule 3 requires a "notice of appeal" in order to seek appellate review of a district-court decision and sets forth specific requirements for the notice, this Court held that a document that does not strictly comply with Rule 3 (such as a brief filed in lieu of a proper notice of appeal) can sometimes suffice. *Smith v. Barry*, 502 U.S. 244, 248-50 (1992); *see also Becker v. Montgomery*, 532 U.S. 757, 768 (2001) (concluding that an appellant's failure, in violation of the Rules, to sign a notice of appeal was not fatal to the appeal, and finding that the court of appeals should have accepted the appellant's corrected notice of appeal); *cf. Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017) (recognizing, in the class-action context, that "finality [for purposes of appeal] is to be given a practical rather than a technical construction"); *Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 387 (1978) (refusing to give the separate-judgment requirement an interpretation that would defeat a party's appellate rights "where the notice did not mislead or prejudice the appellee") (internal quotation marks omitted). In sum, the Rules are designed to maximize the adjudication of appeals on the merits.

This Court's treatment of claim-processing rules concerning appellate practice is consistent with the overarching goal that the Federal Rules be construed to favor an adjudication of claims on the merits. This Court has noted that the Rules generally should not be construed to require "summary dismissals," and instead should "not only permit, but should as nearly as possible guarantee that bona fide complaints be

carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *see also* Fed. R. Civ. P. 1 (providing that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (citation omitted); *see also Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (recognizing that the Federal Rules of Civil Procedure "are designed to discourage battles over mere form of statement" and that Rule 8(a)(2) "indicates that a basic objective of the rules is to avoid civil cases turning on technicalities") (citations omitted).

In seeking a determination that Rule 23(f) is insusceptible to equitable exceptions (Pet. Br. 17-21), Nutraceutical misreads language from *Manrique v. United States*, 137 S. Ct. 1266 (2017) and *Eberhart v. United States*, 546 U.S. 12 (2005), in which this Court stated that claim-processing rules are "unalterable." *Manrique*, 137 S. Ct. at 1272; *Eberhart*, 546 U.S. at 15. This language, however, is taken from *Kontrick*, which specifically left open the possibility that claim-processing rules "could be softened on equitable grounds[,]" but did not reach the issue because the Court found a forfeiture of the right to enforce the rule. *Kontrick*, 540 U.S. at 456-57. Nor did *Manrique* or *Eberhart* have occasion to address the applicability of equitable exceptions. *Eberhart*, like *Kontrick*, found a

forfeiture of the opportunity to enforce the claim-processing rule at issue, and the question of equitable exceptions therefore did not arise. *See Eberhart*, 546 U.S. at 19. And in *Manrique*, no argument was made that equitable exceptions could apply, and the Court's decision was therefore addressed only to the issues of whether: (i) the claim-processing rule at issue had been violated; and (ii) any violation could be overlooked merely because the Government was not harmed by the violation. *Manrique* and *Eberhart* therefore offer no support for Nutraceutical's argument that Rule 23(f) is insusceptible to equitable exceptions.

In sum, the Federal Rules and this Court's precedents simply do not support Nutraceutical's proposal that Rule 23(f) be interpreted to preclude equitable exceptions.

D. Court-of-Appeals Case Law Further Shows that Nonjurisdictional Claim-Processing Rules Can Be Subject to Equitable Exceptions

The courts of appeals additionally recognize that nonjurisdictional claim-processing rules can be subject to equitable exceptions. For instance, the Sixth Circuit recognized that Appellate Rule 15(d) is a claim-processing rule that "permits forfeiture and equitable exceptions to the deadline" and therefore granted a motion to intervene despite the untimeliness of the motion under the Rule. *Int'l Union of Operating Eng'rs, Local 18 v. NLRB*, 837 F.3d 593, 596 (6th Cir. 2016). Similarly, the Second Circuit: (i) recognized that Civil Rule 6(b)(2)—which states that certain deadlines are not extendable—is a nonjurisdictional claim-processing rule and is therefore subject to equitable

exceptions; and (ii) remanded the case to the district court for a decision on whether waiver or an equitable exception applied to the facts presented there. *Legg v. Ulster Cty.*, 820 F.3d 67, 79-80 (2d Cir. 2016). The Seventh Circuit has likewise applied equitable tolling to Civil Rule 58(c)(2)(B). *Carter v. Hodge*, 726 F.3d 917, 919-20 (7th Cir. 2013); *see also Mobley*, 806 F.3d at 577-78 (finding that equitable considerations excused the untimely filing of a motion under Civil Rule 59(e)); *Khan*, 494 F.3d at 258-60 (concluding that a court can recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); *United States v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 216 (3d Cir. 2000) (Alito, J., concurring) (noting that "both the Supreme Court and [the Third Circuit] have recognized an equitable exception to Rule 59"). In sum, the courts of appeals, like this Court, recognize that the Federal Rules can be subject to equitable exceptions.

III. Rule 23(f) Is Subject to Equitable Exceptions Such as Equitable Tolling

Nutraceutical argues that the time prescription in Rule 23(f) is unusually "emphatic" such that equitable considerations are precluded. Pet. Br. 17-19. This Court's precedents belie Nutraceutical's argument. *See, e.g.*, *Wong*, 135 S. Ct at 1632-33 (concluding that a time prescription stating that an untimely filing "shall be forever barred" was subject to equitable tolling). Moreover, as explained below, applying equitable tolling to Rule 23(f) is entirely consistent with the plain language of the Federal Rules and the purpose and importance of Rule 23(f).

A. The Federal Rules Confirm that Rule 23(f) Is Subject to Equitable Exceptions

1. The Purpose of Rule 23(f) Confirms that Tolling Is Available

As this Court has recognized in applying tolling in the class-action context, a statute of limitations "does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974). So too with Civil Rule 23(f), which was intended to be applied flexibly. This Court recently recognized that Rule 23(f) "commits the decision whether to permit interlocutory appeal from an adverse certification decision to 'the sole discretion of the court of appeals.'" *Microsoft*, 137 S. Ct. at 1709 (citing Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment). Indeed, "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by [this Court] in acting on a petition for certiorari[,]" and "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. With respect to Rule 23(f) petitions, "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by [this Court] in acting on a petition for certiorari[,]" and "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. Based on this envisioned

flexibility, it only makes sense that the courts of appeals are permitted to take equitable considerations such as tolling into account in deciding whether to permit an appeal. This is especially so where the putative appellant has sought reconsideration in the district court, thus giving the district court an opportunity "to correct [its] own alleged errors" to "prevent[] unnecessary burdens being placed on the court[] of appeals." *Ibarra*, 502 U.S. at 6.

2. Appellate Rule 3(a) Confirms that Equitable Exceptions Can Be Applied to Rule 23(f)

In at least two ways, Appellate Rule 3(a) demonstrates that Rule 23(f) can be subject to equitable exceptions. *First*, this Rule provides that "[a]n appellant's failure to take any step other than the timely filing of a *notice of appeal* does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." Fed. R. App. P. 3(a)(2) (emphasis added). Notably, the Rules provide that the failure to timely file a *notice of appeal* (which is required in appeals as of right, but not in appeals by permission under Rule 23(f)) can affect the validity of the appeal, but does not say that the failure to timely file a *petition for permission to appeal*[5] affects the

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[5] Unlike appeals as of right, which require a putative appellant to file a notice of appeal in the district court to transfer jurisdiction from the district court to the court of appeals (*see* Fed. R. App. P. 3(a)(1); Fed. R. App. P. 4(a)(1)(A)), appeals by permission to file, with the court of appeals, a petition for permission to appeal. Fed. R. App. P. 5(a).

validity of the appeal. The Rules draw a sharp distinction between: (i) notices of appeal; and (ii) petitions for permission to appeal. *Compare* Fed. R. App. P. 3(a)(1) and (2) (providing for procedures concerning notices of appeal) *with* Fed. R. App. P. 3(a)(4) (referencing the procedure concerning petitions for permission to appeal). This distinction in the Rules was no accident, as Appellate Rule 3(a) is not the only Rule that differentiates notices of appeal from petitions for permission to appeal. Indeed, in appeals by permission, "a notice of appeal need not be filed." Fed. R. App. P. 5(d)(2).

Because the Federal Rules draw a distinction between notices of appeal and petitions for permission to appeal, it is noteworthy that when Appellate Rule 3(a)(2) discusses missteps that can "affect the validity of the appeal," it refers only to late-filed notices of appeal—and not petitions for permission to appeal. Therefore, like most other provisions in the Federal Rules, a failure to timely file a Rule 23(f) petition for permission to appeal "is ground only for the court of appeals to act as it considers appropriate." Fed. R. App. P. 3(a)(2). A court of appeals faced with a late petition for permission to appeal is therefore empowered—but by no means required—to "dismiss[] the appeal." Fed. R. App. P. 3(a)(2). Because the courts of appeals can "act as [they] consider[] appropriate" in deciding whether to accept late-filed petitions for permission to appeal, the Rules demonstrate that equitable considerations such as tolling and the unique-circumstances doctrine can factor into the analysis.

Second, Appellate Rule 3(a)(4) specifies that "[a]n appeal by permission *under 28 U.S.C. § 1292(b)* or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively." Fed. R. App. P. 3(a)(4) (emphasis added). The Rule, however, is silent as to appeals under Rule 23(f)—which was enacted under 28 U.S.C. § 1292(e), not § 1292(b).[6] *Id.*; *see also* Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment (recognizing that Rule 23(f) "is adopted under the power conferred by 28 U.S.C. § 1292(e)"). That Rule 3(a)(4) limits the manner in which parties can take § 1292(b) appeals and bankruptcy appeals—but is silent as to Rule 23(f) appeals—is further evidence that the Rules envision more flexibility with respect to Rule 23(f) appeals. Accordingly, Rule 3(a)(4) is further support that Rule 23(f) is subject to equitable considerations such as equitable tolling.

3. Applying Equitable Exceptions to Rule 23(f) Is Fully Consistent with Appellate Rules 26(b) and 2

Nutraceutical's argument that applying equitable tolling to Rule 23(f) runs afoul of Rule 26(b) (Pet. Br. 22-25) fails for multiple reasons.

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[6] Section 1292(b) permits interlocutory appeals only if: (i) the district court determines that there is a controlling question of law on which there is substantial ground for difference of opinion; and (ii) the court of appeals permits an appeal to be taken. Section 1292(e) permits this Court to enact rules to permit other types of interlocutory appeals that are not otherwise permitted by statute. Unlike § 1292(b) appeals, parties seeking a Rule 23(f) appeal need only seek permission to appeal from the court of appeals; permission from the district court is not required.

First, Nutraceutical's argument rests on a misreading of Appellate Rule 26(b). Rule 26(b) provides generally that "[f]or good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires." The Rule then carves out some exceptions to this broad proposition, including the prohibition on "extend[ing] the time to file" a petition for permission to appeal." Fed. R. App. P. 26(b)(1). In context, this Rule simply prohibits a court from extending the time to file a petition for permission to appeal based upon the forgiving good-cause standard; it does not speak to equitable tolling. Moreover, Rule 26(b)'s prohibition is limited to "extend[ing] the time to file" a petition for permission to appeal. *Id.* It does not speak at all to permitting a Rule 23(f) petition to be filed after the deadline expires. *See id.* (providing that a court "may permit an act to be done after that time expires"). Accordingly, the plain text of Rule 26(b) does not prohibit the application of tolling—an equitable consideration that comes into play *only after the deadline otherwise would have expired*. Had Rule 26(b) been intended to prohibit a court of appeals from permitting a petition for permission to appeal to be filed after the deadline expires, the Rule could have said so. The plain text of the Rule unambiguously draws a distinction between: (i) extending a time period; and (ii) permitting an act to be done after the time expires. Because the Rule prohibits only the former—and not the latter—with respect to petitions for permission to appeal, this is another strong indication that Civil Rule 23(f) is subject to equitable tolling.

Second, applying equitable tolling to claim-processing rules such as Rule 23(f) is no more an impermissible "extension" of the time to appeal under Rule 26(b) than is the application of forfeiture or waiver to rules such as Rule 23(f) or Appellate Rule 4(a)(5)(C). Forfeiture and waiver both involve a court overlooking a violation of a claim-processing rule, yet this Court has never considered the doctrines of forfeiture or waiver to constitute an impermissible "extension" of the appeal period under Rule 26(b). *Eberhart* provides an apt illustration. There, although: (i) a motion for a new trial had been untimely filed under the Federal Rules of Criminal Procedure; and (ii) the Rules expressly prohibited an extension of this time period; this Court found that the Government had forfeited the protection of the Rule, and therefore held that the Seventh Circuit was required to rule on the merits. *See Eberhart*, 546 U.S. at 15-18; *see also Hamer*, 138 S. Ct. at 17, 22 (recognizing that Appellate Rule 4(a)(5)(C) is subject to forfeiture and waiver).

There is no reason to treat equitable tolling differently from forfeiture or waiver, both of which are entirely consistent with Rule 26(b). "A fundamental fallacy underlying [Nutraceutical's] approach . . . is that it confuses extending a limitations period with suspending one." *Henderson v. Shinseki*, 589 F.3d 1201, 1223 (Fed. Cir. 2009) (Mayer, J., dissenting).[7] Contrary to Nutraceutical's suggestion, "[t]olling does not extend any statutory deadline; instead it 'temporarily halts' the running of the statutory clock."

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[7] This Court subsequently granted certiorari and reversed the Federal Circuit's decision that the time prescription at issue was jurisdictional. *Henderson v. Shinseki*, 562 U.S. 428 (2011).

Id. (citing *Jaquay v. Principi*, 304 F.3d 1276, 1281 n.2 (Fed. Cir. 2002) (en banc)). Accordingly, Nutraceutical's suggestion that the Ninth Circuit's application of equitable tolling is somehow an impermissible "extension" under Rule 26(b) is simply incorrect. Rather, equitable tolling simply recalibrates the manner in which Rule 23(f)'s 14-day time period is calculated. As applied to this case, equitable tolling simply stopped the 14-day period to file a Rule 23(f) petition until the district court resolved Lambert's motion for reconsideration. This is entirely consistent with Rule 26(b).

Recognizing the express distinction in Rule 26(b) between: (i) extending a time period; and (ii) accepting a late-filed petition for permission to appeal, is consistent with the way in which this Court applies its Rules. For example, this Court's Rules provide that the time for filing an *amicus curiae* brief "will not be extended." Sup. Ct. R. 12.6; *see also* Sup. Ct. R. 37.3(a) (providing that "[m]otions to extend the time for filing an *amicus curiae* brief will not be entertained"). Yet this Court has permitted the filing of *amicus curiae* briefs out of time. *See, e.g.*, *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1452 (2017) (granting motion for leave to file *amicus curiae* brief out of time); *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 551 U.S. 1180 (2007) (granting, over the opposition of parties to the case, motion for leave to file *amicus curiae* brief out of time).

Additionally, Appellate Rule 2 is no bar to the application of equitable tolling, contrary to Nutraceutical's arguments. Pet. Br. 25-27. Rule 2 simply provides that Rule 26(b) cannot be suspended.

But because the application of equitable tolling to Civil Rule 23(f) is entirely consistent with Appellate Rule 26(b), as explained above, Appellate Rule 2 simply has no bearing on the availability of equitable tolling.

4. Other Federal Rules Further Confirm that Rule 23(f) Is Subject to Equitable Exceptions

Recognizing equitable considerations with respect to Rule 23(f) is also consistent with the Federal Rules because when a Rule is to be interpreted as mandating an automatic disposition of a claim or defense without regard to the circumstances, it says so explicitly. *See* Fed. R. Civ. P. 12(h)(3) (providing that "[if] the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action) (emphasis added); Fed. R. Civ. P. 55(b)(1) (under certain circumstances, the clerk "must enter judgment" against a defaulting party); *see also* Fed. R. Civ. P. 12(h)(1) (providing that certain defenses are deemed waived if not presented within the prescribed timeframe). Rule 23(f) gives no indication that a district court's extension of time beyond the time period allowed by the Rule should result in automatic dismissal of the appeal, and therefore should not be so interpreted. *See Schacht*, 398 U.S. at 64 (noting that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require"); *see also State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442-43 (2016) (concluding that the violation of a court's seal order under the False Claims Act does not automatically require dismissal of a case, in part because other provisions of the False Claims Act "do

require, in express terms, the dismissal of a relator's action").

In sum, the structure of the Federal Rules supports a construction of Rule 23(f) that gives courts recourse to equitable considerations.

5. Nutraceutical's Concessions Highlight that Rule 23(f) Is Subject to Equitable Exceptions

Nutraceutical's argument that Rule 23(f) is not subject to equitable exceptions is also in tension with its recognition that a motion for reconsideration filed within 14 days suspends the time to appeal. *See* Reply for Pet. 5 (recognizing that "a motion for reconsideration can toll Rule 23(f)'s deadline if it is filed before the 14-day deadline in Rule 23(f) expires"); Pet. Br. 43-44. The Ninth Circuit properly recognized that if Rule 23(f) is subject to this supposedly extra-textual exception,[8] there is no reason why tolling should be limited only to motions filed within the 14-day timeframe. Indeed, as the Ninth Circuit correctly explained, Nutraceutical's proposal that tolling should apply only to reconsideration motions filed within 14 days "has no basis in Rule 23 or any other Rule, but instead is a judicial construct. Litigants have no reason to know that their deadline for filing a motion for reconsideration is effectively fourteen days, rather

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[8] As explained in detail above (*supra* Sec. I), recognition that a timely filed reconsideration motion suspends the time to appeal is, in fact, firmly grounded in the text of the Federal Rules. For purposes of this section only, however, Lambert assumes *arguendo* that there is no such explicit textual basis for tolling the Rule 23(f) deadline.

than whatever the district judge has ordered." Pet. App. 16.

If Rule 23(f) truly were as unyielding as Nutraceutical contends, there would be no room for concluding that a reconsideration motion filed within 14 days of a decertification suspends the time to seek appellate review. Nutraceutical points to no principled basis for concluding that equitable exceptions to Rule 23(f) should be so limited, and indeed, none exists. Nutraceutical's recognition that Rule 23(f) is subject to this exception undermines its argument that the 14-day time period is insusceptible to equitable exceptions.

6. Nutraceutical's Cited Authority Does Not Demonstrate that Rule 23(f) Is Insusceptible to Equitable Exceptions

Nutraceutical relies heavily on *United States v. Robinson*, 361 U.S. 220 (1960) and *Carlisle* to conclude that Rule 23(f) is insusceptible to equitable exceptions. But neither case is on point.

As an initial matter, it is questionable whether *Robinson* is still good law in view of this Court's subsequent precedents. For instance, *Harris Truck Lines*, *Thompson*, and *Wolfsohn* (discussed in detail above and all decided after *Robinson*) permitted an equitable exception to an appeal-filing deadline, and directed that late-filed notices of appeal be accepted. Moreover, *Kontrick* held that nonjurisdictional claim-processing rules are subject to forfeiture, and expressly left open the possibility that they "could be softened on equitable grounds." *Kontrick*, 540 U.S. at 456-57. Regardless, *Robinson* is readily distinguishable from

the instant case. Importantly, *Robinson* involved a criminal appeal as of right, which was "of relatively recent origin" in federal courts. *Robinson*, 361 U.S. at 226. Based upon the history of the statute authorizing such appeals, it had been "uniformly held" that the deadline to take such an appeal was "mandatory and jurisdictional," and that untimely appeals were "always . . . dismissed regardless of excuse." *Id.* at 226-27.

Rule 23(f), in sharp contrast, governs the time to appeal a specific order in a civil case. When Rule 23(f) was promulgated, it was well-established that the time to appeal in a civil case was extendable based upon the equitable considerations of excusable neglect or good cause, or based upon a putative appellant's failure to receive timely notice of the adverse judgment. *See* 28 U.S.C. § 2107(c). Because the time to appeal in civil cases has long been subject to equitable considerations under certain circumstances, it would be incongruous to interpret Rule 23(f) otherwise, absent clear language evincing a contrary intent. Moreover, *Robinson* did not consider any rule analogous to Appellate Rule 3(a), which, as explained above, strongly suggests that courts of appeals have discretion in whether/how to accept a late petition for permission to appeal. Finally, *Robinson* pre-dates *Harris Truck Lines* and *Thompson*, which make clear that equitable exceptions can apply to appellate filing deadlines.

Carlisle is similarly not on point, because contrary to Nutraceutical's argument, that case did not hold that Criminal Rule 45(b) "precluded equitable exceptions." Pet. Br. 9. Rather, the case simply rejected the petitioner's multiple untenable interpretations of the Rule. *Carlisle*, 517 U.S. at 418-

33. Nothing in the majority opinion discussed—let alone decided—whether the Rule could be subject to equitable exceptions.

7. Tolling Rule 23(f)'s Time Prescription During the Pendency of a Timely Filed Reconsideration Motion Fulfills the Purposes of the Rules, Whereas Failure to Do So Would Lead to Senseless Inefficiencies

Nutraceutical alleges that subjecting nonjurisdictional claim-processing rules to equitable exceptions will cause a multitude of adverse consequences, such as creating "uncertainty" in class-action litigation (Pet. Br. 11, Pet. Br. 33-34). Nutraceutical also worries that the availability of equitable exceptions will "force[]" courts of appeals "to decide whether a verbal representation at a status conference, a letter, or a call to the clerk's office, was sufficient to toll the Rule 23(f) deadline." Pet. Br. 34.

First, Nutraceutical's concerns fail to account for the fact that a court of appeals never has an obligation to accept an interlocutory appeal under Rule 23(f). Indeed, "[t]he court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by [this Court] in acting on a petition for certiorari[,]" and "[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. A putative appellant therefore will have no motivation to miss the Rule 23(f) deadline, because a late petition is very unlikely to be granted. Accordingly, it will be unusual for a party to

miss the Rule 23(f) deadline, and even rarer for a party to invoke equitable exceptions.

The Ninth Circuit, with its routine handling of state-law consumer-fraud class actions, was in the best position to know whether Lambert's petition "present[ed] a novel or unsettled question of law," which courts of appeals use as a major factor in their exercise of their "unfettered discretion." *In re Marietta Mem. Hosp.*, No. 17-0312, 2018 U.S. App. LEXIS 460, at *1-2 (6th Cir. Jan. 8, 2018). In balancing the equities of allowing the 23(f) appeal to go forward, the Ninth Circuit thus weighed the interest of the public in judicial efficiency, which weighed in favor of using the present fairly small and simple case as a vehicle to resolve a split in how district courts interpreted California's Unfair Competition Law and False Advertising Law. *Cf. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("[W]hen federal courts contemplate equitable relief, our holding must also take account of the public interest."). Because the courts of appeals are in the best position to know what unsettled issues of law divide the district courts within their circuit, an appellate court's decision to grant a 23(f) petition should not be disturbed absent a compelling reason. No such compelling reason exists here.

Second, district courts generally need not stay their proceedings while a Rule 23(f) interlocutory appeal is pending. Fed. R. Civ. P. 23(f) ("An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."). Although Nutraceutical complains that delays can be caused when a party seeks to take an interlocutory appeal

(Pet. Br. 31-35), a motion for reconsideration—filed within the time expressly permitted by the district court—is not a significant cause of that delay. Rather, the delay stems from: (i) the amount of time that the district court takes to decide the reconsideration motion—which is not governed by the Federal Rules; and (ii) the district court's discretionary decision to stay proceedings during the appeal. Indeed, in this case, the district court took several months to decide the reconsideration motion. The 20-day period between the original decertification order and the filing of Lambert's reconsideration motion pales in comparison to the several months that the district court took to decide the reconsideration motion.

Third, Nutraceutical's concerns about the uncertainty that equitable exceptions could inject into district-court proceedings are unfounded, as is evidenced by the availability of equitable tolling in the statute-of-limitations context. This Court has long held that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland*, 560 U.S. 631, 645-46 (emphasis in original) (quoting *Irwin*, 498 U.S. at 95-96). Nutraceutical makes no suggestion that the availability of equitable tolling in this context has caused an undue burden on the federal courts, even though equitable tolling requires a fact-specific analysis. Similarly, there is no reason to suggest that subjecting Rule 23(f) to equitable tolling should be unworkable. Indeed, for many years, this Court and the courts of appeals have recognized equitable exceptions to nonjurisdictional claim-processing rules. Nutraceutical points to no evidence of any adverse consequences that have arisen from the application of

equitable exceptions in the cases where such exceptions are warranted.

In sum, Nutraceutical's argument for a categorical rule that Rule 23(f) is insusceptible to equitable considerations has no support in this Court's precedents or in the Federal Rules. Nor has Nutraceutical pointed to any negative consequences that have flowed from the many cases that have applied equitable exceptions to nonjurisdictional requirements. The Ninth Circuit's judgment therefore should be affirmed.

Moreover, Nutraceutical's proposed rule would waste party and judicial resources. It would have required Lambert, after the district court stated it would reconsider its order and provided a hearing date and briefing schedule for reconsideration, to nonetheless file a Rule 23(f) petition in order to appeal the initial order being reconsidered.

In this scenario, if Lambert had been successful with the motion for reconsideration, he would have had to dismiss his Rule 23(f) petition, despite the time he spent writing it, the time Nutraceutical spent opposing it, and the time the Motions Panel spent considering it, all a completely wasted effort. If the district court, as it actually did, modified its order but denied certification, Lambert would have had to file a second petition that explained why the new order was in error.

Nutraceutical's position, if adopted, calls for the motions panels of our circuit courts to regularly and needlessly consider Rule 23(f) petitions involving orders that are later amended, expanded upon,

vacated, modified, or withdrawn because of subsequent motions.

Here, there are only two relevant orders, but in other cases district courts deny certification without prejudice or deny certification pending additional evidence or briefing, often several times.[9] Nutraceutical would have class-action litigants on both sides, after receiving unfavorable but non-final decisions on certification, nonetheless barrage circuit courts with petition after petition in order to preserve their right to appeal the eventual final order granting or denying certification. Such a procedure would be inimical to "efficiency and economy of litigation, a principal purpose of Rule 23[.]" *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1811 (2018). Indeed, in finding that a statutory period for filing an employment-discrimination suit was tolled during the pendency of a class action, this Court recognized that a contrary rule would lead to "an increase in protective filings in all class actions." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983). This Court should not adopt a rule that leads to such inefficiencies. Indeed, what Nutraceutical proposes is that this Court create a new category of protective Rule 23(f) petitions for permission to appeal.

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[9] *See, e.g.*, *Red v. Kraft*, No. 2:10-cv-01028-GW-AGR (C.D. Cal.), ECF Nos. 95, 145, 156, 216, 217, 259 (entertaining three different motions, some with supplemental briefing and supplemental hearings, regarding class certification).

B. The Importance of Interlocutory Review of Class-Certification Decisions Further Confirms that Rule 23(f) Is Subject to Equitable Exceptions

Nutraceutical wrongly argues that equitable exceptions should not apply to Rule 23(f) because a party who has missed the deadline "is fully entitled to appeal the district court's certification order after final judgment." Pet. Br. 36. This argument is irreconcilable with the Rules Committee's recognition that a class-certification decision can be important enough to warrant an interlocutory appeal. As for plaintiffs who have been denied certification, they may be "confront[ed] . . . with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation." Fed. R. Civ. P. 23(f) Advisory Committee's Note to 1998 amendment. As for defendants, an order granting class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *Id.* Rule 23(f) meets these concerns "at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues." *Id.* Indeed, the Rules Committee recognized that class-certification orders can be "dispositive of the litigation." *Id.*

This Court has similarly recognized the importance of Rule 23(f), describing it as "the product of careful calibration." *Microsoft*, 137 S. Ct. at 1709. Rule 23(f) was designed to provide class-action litigants with "significantly greater protection against improvident

certification decisions than [28 U.S.C.] § 1292(b) alone offered." *Id.* (citation omitted). Given the potentially high stakes of class-certification decisions, Nutraceutical is simply incorrect to suggest that an appeal after final judgment is an adequate substitute for a Rule 23(f) appeal.

IV. Nutraceutical's Challenge to the Ninth Circuit's Factbound Application of Equitable Exceptions Here Is Not Fairly Included Within the Question Presented, and, in Any Event, Is Without Merit

A. Nutraceutical's Factbound Challenge Is Beyond the Scope of the Question Presented and Therefore Should Not Be Considered

Nutraceutical's petition for certiorari made clear that it was seeking review only of whether nonjurisdictional claim-processing rules such as Rule 23(f) can be subject to equitable exceptions, not whether the Ninth Circuit struck the right balance in its weighing of the equities in this particular case. The Question Presented, as framed by Nutraceutical, is whether "the Ninth Circuit err[ed] by holding that equitable exceptions apply to mandatory claim-processing rules and excusing a party's failure to timely file a petition for permission to appeal, or a motion for reconsideration, within the Rule 23(f) deadline[.]" Pet. for Cert. i. Nothing in the Question Presented remotely suggests that Nutraceutical was seeking review of whether the facts of this particular case would warrant equitable tolling or any other equitable exception; nor did anything else in Nutraceutical's certiorari-stage briefing so suggest.

Nevertheless, Nutraceutical now for the first time asks this Court to second-guess the Ninth Circuit's conclusion that under the facts of this case, tolling is warranted. Pet. Br. 38-43. This Court should decline to do so.

"Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). "A question which is merely 'complementary' or 'related' to the question presented in the petition for certiorari is not "'fairly included therein.'" *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (citing *Yee v. Escondido*, 503 U.S. 519, 537 (1992)).

This Court regularly denies petitioners' requests to consider issues beyond the scope of the question presented in circumstances strikingly similar to those here. For instance, in one case that this Court accepted to determine the appropriate standard of review, the petitioner attempted to argue that regardless of the standard of review, the judgment should be reversed. *Fry v. Pliler*, 551 U.S. 112, 120-21 (2007). This Court declined to consider that argument, recognizing that it "granted certiorari to decide a question that has divided the Courts of Appeals" and further noting that the question of whether "it matter[ed] which . . . standard is employed" is not the same as "whether the Ninth Circuit misapplied [the standard] in this particular case." *Id.* Similarly, in a case in which certiorari was granted "to decide only [a] purely legal question" regarding a statute of limitations, this Court refused to "go beyond the writ's question to reexamine the fact-based rule-application issue" that the petitioners raised at the merits stage. *Klehr v. A.O.*

Smith Corp., 521 U.S. 179, 193 (1997). Moreover, in a case involving the procedural question of whether a court of appeals is permitted to invoke a nonjurisdictional time bar *sua sponte*, this Court declined the petitioner's invitation to additionally consider whether the Eleventh Circuit had properly interpreted the underlying time bar. *Day v. McDonough*, 547 U.S. 198, 203 n.2 (2006).

This Court should decline Nutraceutical's invitation to rebalance the equities here. Because Nutraceutical's factbound challenge to the Ninth Circuit's application of equitable tolling is neither set out in Nutraceutical's petition nor fairly included therein, the Court should decline to consider it. Indeed, in seeking to disturb the Ninth Circuit's application of tolling to the facts of this case, Nutraceutical asks this Court to "devote[] [its] efforts . . . to addressing a relatively factbound issue which does not meet the standards that guide the exercise of [this Court's] certiorari jurisdiction." *Izumi*, 510 U.S. at 34. As it has done before, this Court should "read the question presented to avoid these tangential and factbound questions." *Fry*, 551 U.S. at 121.

B. Even if Considered, Nutraceutical's Factbound Challenge Is Without Merit

In any event, Nutraceutical's factbound disagreement with the Ninth Circuit's application of equitable considerations here does not warrant reversal. Nutraceutical's argument that the Ninth Circuit adopted impermissibly "broad" equitable exceptions (Pet. Br. 7-8, 11-12, 30-31, 38-43) is merely a disagreement with the Ninth Circuit's application of equitable tolling to the facts of this case. For instance, Nutraceutical faults the Ninth Circuit for looking to

factors such as: (i) whether Lambert pursued his rights diligently; (ii) whether external circumstances, such as a district-court imposed deadline, affected Lambert; (iii) whether within the 14-day deadline, Lambert took action similar to filing a motion for reconsideration that conveyed his intent to file a written reconsideration motion; and (iv) whether within the 14-day deadline, Lambert explained the basis for the written motion. Pet. Br. 41. But these factors are merely a restatement of the well-established equitable-tolling factors. In particular, equitable tolling is warranted where the proponent shows that: (1) he has been pursuing his rights diligently, and (2) some extraordinary circumstances stood in his way and prevented timely filing. *Holland*, 560 U.S. at 649. Factors (i), (iii), and (iv) above are merely factors that are probative of diligence, and factor (ii) is probative of whether extraordinary circumstances exist.

The Ninth Circuit carefully considered the equities and concluded, based upon this Court's well-established equitable-tolling guidelines, that equitable tolling was warranted. Pet. App. 12-15. There is no basis to disturb that conclusion. As discussed above, the Ninth Circuit was in the best position to determine whether the 23(f) petition should have been granted. Moreover, the Ninth Circuit's decision to permit the appeal to go forward is squarely in line with this Court's longstanding recognition that there are certain "unique circumstances" that permit an otherwise untimely appeal to proceed.

1. The Ninth Circuit Correctly Concluded that Equitable Tolling Is Warranted Here

As noted above, equitable tolling is appropriate if the proponent shows that: (1) he has been pursuing his rights diligently, and (2) some extraordinary circumstances stood in his way and prevented timely filing. *Holland*, 560 U.S. at 649. Nutraceutical does not seriously dispute that Lambert was pursuing his rights diligently. Nor could it. As the Ninth Circuit correctly found, Lambert, 10 calendar days after the initial decertification order: (i) clearly conveyed his intention to seek reconsideration; (ii) described the basis for seeking reconsideration; and (iii) otherwise acted diligently. Pet. App. 14. As for extraordinary circumstances, the Ninth Circuit properly found that: (i) the district court "instructed Lambert to file his [reconsideration] motion within ten days, which allotted him twenty days in total from the decertification order[;]" and (ii) Lambert "filed his motion for reconsideration within the period set by the district court." Pet. App. 14. For these reasons, the Ninth Circuit concluded that equitable tolling is warranted. Pet. App. 14-15.

Contrary to Nutraceutical's contention (Pet. Br. 38-39), the Ninth Circuit correctly applied the equitable-tolling factors. Nutraceutical misplaces reliance on *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016), which found that equitable tolling was unwarranted "where the [Menominee Tribe] had mistakenly relied on a district court's order in another case." Pet. Br. 39 (citing *Menominee*, 136 S. Ct. at 757). But here, unlike in *Menominee*, Lambert relied on the

district court's order *in this very case*. When the district court has given erroneous assurances regarding the timeliness of a motion that would ordinarily suspend the time to appeal, this Court has recognized that it is a sufficiently extraordinary circumstance that warrants granting an equitable exception. *Thompson*, 375 U.S. at 385-87. The facts of this case are directly analogous to those in *Thompson*. Therefore, the Ninth Circuit correctly concluded that equitable tolling is warranted.

2. The Facts of This Case Are Directly Analogous to *Thompson*, Which Applied the Unique-Circumstances Doctrine

The facts of this case also fall squarely within the unique-circumstances doctrine as articulated in *Thompson* and reiterated in *Osterneck*. In *Thompson*, the petitioner filed a post-trial motion that, if timely filed would suspend the time to appeal until the resolution of the motion. *Thompson*, 375 U.S. at 386. The motion, however, was two days late. *Id.* Nevertheless, the district court stated that the motion was filed "in ample time," and the Government never contended otherwise at the district court. *Id.* Due to these "unique circumstances," this Court concluded that the notice of appeal—filed within 60 days of the resolution of the post-trial motion but not within 60 days of the original decision—should have been deemed timely, and the appeal considered on the merits. *Id.* at 387. Put differently, because: (i) the petitioner "did an act which, if properly done, postponed the deadline for the filing of his appeal[;]" and (ii) "the District Court concluded that the act had been properly done[,]" the

appeal should have been allowed to proceed. *Id.*; *see also Osterneck*, 489 U.S. at 179 (concluding that an appeal should be considered on the merits "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurances by a judicial officer that this act has been properly done").

Thompson is directly on point.[10] As in *Thompson*, the district court assured Lambert that his reconsideration motion would be timely if filed by March 12, 2015. In reliance on that assurance, Lambert filed his reconsideration motion on that date, without objection from Nutraceutical. Accordingly, Lambert's motion was properly considered timely, and the Ninth Circuit correctly concluded that the time to file a Rule 23(f) petition ran from the June 24, 2015 disposition of Lambert's reconsideration motion.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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[10] At oral argument, the Ninth Circuit recognized the possibility that this case falls within the unique-circumstances doctrine. Oral Argument at 24:18-42, *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170 (2017) (No. 15-56423), https://www.ca9.uscourts.gov/media/view.php?pk_id=0000030181.

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No. 17-1094

In the Supreme Court of the United States

NUTRACEUTICAL CORP.,

Petitioner,

v.

TROY LAMBERT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

This Court granted certiorari to decide whether Rule 23(f)'s deadline to petition for permission to appeal an order on class certification is subject to equitable exceptions. In the decision below, the Ninth Circuit held that all claim-processing rules are subject to equitable exceptions, and excused Respondent Troy Lambert's untimely Rule 23(f) petition. In doing so, the Ninth Circuit departed from its sister circuits and this Court's precedent, creating an unprecedented equitable standard that will exacerbate the disruption caused by interlocutory appeals and eviscerate Rule 23(f)'s strict 14-day deadline.

This Court has never held that equitable exceptions apply to all claim-processing rules. To the contrary, this Court has recognized that a rule's plain language can "preclude equitable exceptions" when it is written in "emphatic form." *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) (collecting cases). The Rule 23(f) deadline is unquestionably emphatic.

Appellate Rule 26(b) provides that a "court may not extend the time to file . . . a petition for permission to appeal," and Appellate Rule 2 explicitly prohibits courts from suspending Appellate Rule 26(b)'s limitations. On multiple occasions, this Court interpreted nearly identical language in former Criminal Rule 45(b) to preclude equitable exceptions. *Carlisle v. United States*, 517 U.S. 416, 421 (1996); *United States v. Robinson*, 361 U.S. 220, 229 (1960).

The majority of Lambert's brief ignores the authority discussed above, the question presented, and the Ninth Circuit's reasoning. Instead, Lambert claims

that his Rule 23(f) petition was timely regardless of any equitable exceptions. Yet the Ninth Circuit already rejected Lambert's specious claims of timeliness and correctly concluded that his petition was late. *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1176–78 (9th Cir. 2017).

When Lambert does finally address the question presented, he contends that claim-processing rules are "generally subject to equitable exceptions" and offers a protracted discussion on the history of the federal rules and this Court's application of equitable exceptions in other contexts. Resp. Br. 5; *see also id.* at 20–34.

In doing so, Lambert misses the point. Even assuming "equitable exceptions can apply to claim-processing rules," Resp. Br. 21, this Court's longstanding precedent demonstrates that at least some rules preclude equitable exceptions. *Carlisle*, 517 U.S. at 421; *Robinson*, 361 U.S. at 230; *see also Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 157 (2013); *United States v. Brockamp*, 519 U.S. 347, 350–52 (1997). Lambert does not and cannot distinguish this authority, nor can he avoid the impact of Appellate Rule 26(b)'s clear, emphatic language.

Still, even if equitable exceptions could apply here (and they cannot), the law is clear that an external obstacle must have caused Lambert to miss the Rule 23(f) deadline. *See Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). That was not the case here, and the overly broad equitable standard the Ninth Circuit adopted contains no such requirement. *Lambert*, 870 F.3d at 1178 (finding equitable exceptions could apply if, for example, "a litigant took some other action similar to filing a

motion for reconsideration within the fourteen-day deadline"). This failure also constitutes reversible error.

ARGUMENT

I. LAMBERT'S RULE 23(f) PETITION WAS LATE

The Ninth Circuit found that "[u]nder the plain text of Rule 23(f)," Lambert's petition was "untimely." *Id.* at 1176; *see also id.* ("[U]nless an exception applies, Lambert's Rule 23(f) petition would be barred."). The Ninth Circuit then "part[ed] ways with" its "sister circuits," and applied equitable exceptions to Rule 23(f). *Id.* at 1174.

Ignoring those holdings, Lambert argues that this Court need not even reach the question presented because his petition was timely. Resp. Br. 4, 9 n.1. All four of Lambert's arguments fail.

A. LAMBERT DID NOT MAKE AN ORAL MOTION

Lambert's first argument is that he made an "oral motion" for reconsideration at a March 2, 2015 status conference. Resp. Br. 12. This argument is foreclosed by both the conference transcript and Lambert's actions. Lambert initially asked the District Court for "leave to file a renewed motion for class certification." Pet. App. 71. After rejecting Lambert's request, the District Court acknowledged that he could file a motion for reconsideration and Lambert represented that he would do so. *Id.* at 74 ("[W]e will want to file a motion for reconsideration."). Lambert ultimately filed his motion ten days later. JA5–6.

There is therefore no record (*e.g.*, no minute order, docket entry, or the like) of an oral motion, and nothing Lambert's counsel or the District Court said or did suggests an oral motion had been made. As the Ninth Circuit noted, Lambert conveyed merely an "intention to file a motion for reconsideration," *Lambert*, 870 F.3d at 1175, which is "not a filing itself" and therefore not "sufficient to toll the time period" under Rule 23(f). *Gutierrez v. Johnson & Johnson*, 523 F.3d 187, 195 & n.7 (3rd Cir. 2008).

B. RULE 59(e)'s DEADLINE IS IRRELEVANT

Lambert's second argument is that his motion for reconsideration was "timely" because he filed it within Rule 59(e)'s 28-day deadline. Resp. Br. 9–13. This argument fails for two independent reasons.

1. Rule 59(e) Does Not Apply

Rule 59(e) governs only a "motion to alter or amend a *judgment*." Fed. R. Civ. P. 59(e) (emphasis added). While Lambert argues that the District Court's order decertifying the class constitutes a "judgment," the other provisions of Rule 59 demonstrate that "judgment" in this context refers to a final judgment. Indeed, every other subsection of Rule 59 specifically references a motion or action that would be taken *after trial*. *See* Fed. R. Civ. P. 59(a)(1) ("Grounds for New Trial"), 59(a)(2) ("Further Action After a Nonjury Trial"), 59(b) ("Time to File a Motion for a New Trial"), 59(c) ("New Trial on the Court's Initiative or For Reasons Not in the Motion"); *see also McClendon v. United States*, 892 F.3d 775, 781 (5th Cir. 2018) ("Rule 59(e) applies only to final judgments."); *Cobell v. Jewell*, 802 F.3d 12, 19 (D.C. Cir. 2015) (same).

The advisory committee notes to Rule 59(e) further support this definition of "judgment." Rule 59(e) was "added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York*[,] [146 F.2d 321 (8th Cir. 1944)]." Fed. R. Civ. P. 59(e) advisory committee's note to 1946 amendment. In *Boaz*, a dissenting judge questioned a trial court's authority to "recapture trial proceedings" after "unconditional termination of the trial and discharge of the jury." 146 F.2d at 324 (Johnsen, J., dissenting). Rule 59(e) "makes clear that the district court possesses the power" to do so. Fed. R. Civ. P. 59(e) advisory committee's note to 1946 amendment; *see also White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 450 (1982) (discussing Rule 59(e)'s "clear and narrow aim").

Lambert's reliance on Rule 54(a), which defines a "judgment" as "any order from which an appeal lies," likewise fails. Fed. R. Civ. P. 54(a). Lambert argues that certain courts, relying on Rule 54(a), have held that an appealable interlocutory order constituted a judgment. Resp. Br. 11–12. However, Lambert cites cases that—unlike here—considered appeals *as of right*. *See, e.g.*, *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 6 (1st Cir. 2005) (order appealable under Federal Arbitration Act); *Lichtenberg v. Besicorp Grp. Inc.*, 204 F.3d 397, 400 (2d Cir. 2000) (order appealable under 28 U.S.C. § 1292(a)(1)); *Martinez v. Sullivan*, 874 F.2d 751, 753 (10th Cir. 1989) (same).

Here, Lambert could file only a "petition for permission to appeal" under Rule 23(f). He had no right to an appeal, and therefore an appeal did not "lie" within the scope of Rule 54(a). If the law were otherwise, *any* order a district court makes would

constitute a "judgment," because a party can *always* petition for interlocutory appeal under 28 U.S.C. § 1292(b).

It is therefore unsurprising that several courts of appeals have specifically held that an order on class certification does not constitute a "judgment." *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999) (Easterbrook, J.) (explaining that "[a]n order certifying or declining to certify a class is not a 'judgment'" within Rule 59(e)); *cf. Shin v. Cobb Cty. Bd. of Educ.*, 248 F.3d 1061, 1063 (11th Cir. 2001) (per curiam).[1]

2. A Motion for Reconsideration Must Be Filed Before the Appeal Deadline Expires

Even assuming Rule 59(e) governed Lambert's motion, it would not render his Rule 23(f) petition timely. That is because the 14-day deadline in Rule 23(f) is shorter than the 28-day deadline in Rule 59(e), and there is no question that Lambert did not file his motion for reconsideration until *after* the Rule 23(f) deadline expired.

Every court of appeals to consider this issue—the Second, Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits—has held a motion for reconsideration must be filed *before* the Rule 23(f) deadline expires in order to toll the Rule 23(f) deadline.

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[1] While Lambert cites two Fifth Circuit cases—*McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005) and *Robertson v. Monsanto, Co.*, 287 F. App'x 354, 358 (5th Cir. 2008) (unpublished)—both simply assumed, without analysis, that an order on class certification constitutes a "judgment."

See, e.g., *Gary v. Sheehan*, 188 F.3d 891, 892 (7th Cir. 1999) ("[I]f the request for reconsideration is filed more than [14] days after the order . . . [then] appeal must wait until the final judgment."); *Gutierrez*, 523 F.3d at 193; *Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (per curiam); *Blair*, 181 F.3d at 837; *McNamara v. Felderhof*, 410 F.3d 277, 281 (5th Cir. 2005); *Nucor Corp. v. Brown*, 760 F.3d 341, 343 (4th Cir. 2014); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1191 (10th Cir. 2006); *Shin*, 248 F.3d at 1064. Even the Ninth Circuit reached this conclusion below. *See Lambert*, 870 F.3d at 1178.[2]

This Court has adopted the same rule. As it held in *United States v. Healy*, a motion for reconsideration "filed *within the permissible time for appeal* renders the judgment not final for purposes of appeal until the Court disposes of the petition." 376 U.S. 75, 77–78 (1964) (emphasis added)); *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (per curiam) (considering appeal timely where motion filed *before* 30-day appeal deadline in Appellate Rule 4(b) had expired); *United States v. Dieter*, 429 U.S. 6, 7 (1976) (per curiam) (same).

Lambert tries to distinguish *Healy* because it did not involve "any statute or rule governing the effect of rehearing petitions." Resp. Br. 15. That distinction is irrelevant here. *Healy*'s holding that a motion for reconsideration filed "within the permissible time for

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[2] Lambert relies on *Limtiaco v. Camacho*, 549 U.S. 483 (2007), but that case did not involve an expired appeal deadline. The petitioner lost at the Guam Supreme Court and nine days later *timely* petitioned for review by the Ninth Circuit. Brief for Respondent, *Limtiaco v. Camacho*, 549 U.S. 483 (2007) (No. 06–116), 2006 WL 3760843, at *15.

appeal" can postpone an appeal deadline did not depend upon the presence or absence of a rule governing motions for reconsideration. 376 U.S. at 77–78. It was based on "traditional and virtually unquestioned practice." *Dieter*, 429 U.S. at 8 n.3 (citing *Healy*, 376 U.S. at 79).

Lambert cannot cite any authority for his argument that a motion for reconsideration filed *after* an appeal deadline has lapsed can somehow resurrect that expired deadline. Resp. Br. 13–18.

Were Lambert correct, any litigant who knowingly ignored an appeal deadline could resurrect that deadline simply by filing a motion for reconsideration, which in many districts can be filed months or even a year after an order. *See, e.g.*, C.D. Cal. L.R. 7–18 (containing no deadline for motions for reconsideration). This Court has cautioned against the creation of such an illogical and impractical rule. *See Healy*, 376 U.S. at 77 ("[W]e are not faced with an attempt to rejuvenate an extinguished right to appeal."); *see also Jenkins v. BellSouth Corp.*, 491 F.3d 1288, 1289 (11th Cir. 2007) ("[I]n American law, a revival of an enforceable right is an exceptional event.").

Lambert's argument is particularly inappropriate in this context, as it would eviscerate Rule 23(f)'s purpose of creating a deliberately short filing window "to reduce the risk that attempted appeals will disrupt continuing proceedings." Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment; *see also Fleischman*, 639 F.3d at 31 ("[C]onstruing Rule 23(f) to authorize us to permit interlocutory appeal of the denial of a motion to amend a class certification order, at least when such a motion

is filed outside the fourteen-day window, would eviscerate its deliberate and tight restriction on interlocutory appeals.").

C. APPELLATE RULE 4(a) IS INAPPOSITE

Lambert's third argument is that his Rule 23(f) petition is timely under Appellate Rule 4(a)(4)(A)(iv). Resp. Br. 17. But Appellate Rule 4 is inapplicable on its face. It expressly applies only to "Appeals as of Right" and the "Time for Filing a Notice of Appeal." Fed. R. App. 4(a)(1); *see also Blair*, 181 F.3d at 837 (explaining that Appellate Rule 4 governs appeals of "the kind of motions that follow entry of a final decision"). Here, Lambert filed a "petition for permission to appeal" under Rule 23(f); accordingly, Appellate Rule 5 governs—not Appellate Rule 4. Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment (explaining that Appellate Rule 5 was specifically "modified to establish the procedure for petition for leave to appeal under [Rule 23(f)]").

Notwithstanding the above, Lambert claims that Appellate Rule 4 applies because Rule 23(f) "is silent as to the effect of reconsideration motions on the time to appeal," Resp. Br. 17, and Appellate Rule 5 provides: "The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal." Fed. R. App. Proc. 5(a)(2).

Yet by Appellate Rule 5(a)(2)'s plain terms, Appellate Rule 4(a) applies only if a statute or rule *does not* specify the time for filing a *petition for permission to appeal*—not a motion for reconsideration. In this case, Rule 23(f) *does* specify a deadline of 14 days to file

a petition. Consequently, there is no justification for applying Appellate Rule 4(a).

D. THE DISTRICT COURT'S ORDER DID NOT RESTART THE RULE 23(f) DEADLINE

Lambert's fourth argument is that the District Court's order denying his motion for reconsideration created a new deadline under Rule 23(f). Resp. Br. 19–20. The Ninth Circuit did not adopt this argument, *Lambert*, 870 F.3d at 1181 n.8, and for good reason. The plain language of Rule 23(f) permits interlocutory appeals only of orders "granting or denying class-action certification." Fed. R. Civ. P. 23(f). And every court of appeals to address this issue has unanimously held that "[a]n order that leaves class-action status unchanged from what was determined by a prior order is not an order 'granting or denying class action certification,'" and thus does not trigger a new Rule 23(f) deadline. *Carpenter*, 456 F.3d at 1191; *Jenkins*, 491 F.3d at 1291–92; *Gutierrez*, 523 F.3d at 193; *Nucor*, 760 F.3d at 343.[3]

"To hold otherwise would leave Rule 23(f)'s deadline toothless." *In re DC Water & Sewer Auth.*, 561 F.3d 494, 496–97 (D.C. Cir. 2009). Because a party may move to alter or amend a certification decision at any

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[3] The only case Lambert cites—*Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002)—did not reach a contrary conclusion. The district court initially certified a class that the Eighth Circuit characterized as a "limited group" and then subsequently entered an order expanding the class definition "to individuals working through an entire network of mortgage brokers across the nation." *Id.* at 959. Accordingly, the later order changed the status quo and constituted an order "granting or denying class certification." Fed. R. Civ. P. 23(f).

time "before final judgment," Fed. R. Civ. P. 23(c)(1)(C), Lambert's proposed rule would enable litigants to "easily circumvent Rule 23(f)'s deadline by filing a motion to amend or decertify the class at any time after the district court's original order." *Fleischman*, 639 F.3d at 31; *Gary*, 188 F.3d at 893.

In light of the above, the District Court's order denying Lambert's motion did not open a new Rule 23(f) filing window because the District Court did not alter its prior ruling decertifying the class. Pet. App. 27–49. That the District Court also ordered Lambert to provide notice to class members of the prior decertification order certainly did not "change the status quo" and therefore could not have created a new Rule 23(f) deadline. *Gutierrez*, 523 F.3d at 193.

II. CLAIM-PROCESSING RULES CAN PRECLUDE EQUITABLE EXCEPTIONS

Lambert's brief devotes over 14 pages to the general argument that "equitable exceptions can apply to nonjurisdictional claim-processing rules." Resp. Br. 20–34. Lambert rests his argument on the purported "history of the Federal Rules" and notes that this Court has applied the "unique circumstances doctrine" to federal rules in the past. *Id.* at 25–29. Lambert's arguments are nonresponsive.

Even assuming "equitable exceptions can apply to nonjurisdictional claim-processing rules," *id.* at 21, this Court's longstanding precedent demonstrates that at least some rules are not subject to equitable exceptions. *See* Pet. Br. 17–21.

This Court has repeatedly recognized that the plain language of a rule can preclude equitable exceptions.

See Auburn Reg'l Med., 568 U.S. at 157 (rejecting equitable exceptions to a provision that "speaks in no uncertain terms" and where tolling "would essentially gut" its purpose); *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (holding that equitable tolling was "inconsistent with the text of the relevant statute"); *Brockamp*, 519 U.S. at 350–52 (holding that the "unusually emphatic" language, detail, and "the explicit listing of exceptions," demonstrate that other equitable exceptions are not available); *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 26–27 (1989) (holding that a provision was not "subject to equitable modification" where its "language . . . could not be clearer").

This Court reaffirmed that principle in *Kontrick*. Although it did not decide whether equitable exceptions apply to the claim-processing rules at issue there, this Court explained that whether such exceptions could apply depends on "whether the time restrictions in th[e] rules are in such emphatic form as to preclude equitable exceptions." 540 U.S. at 458 (alteration in original) (citation omitted).

In so holding, *Kontrick* cited two decisions from this Court—*Robinson* and *Carlisle*—that construed Criminal Rule 45(b) to preclude equitable exceptions. *Kontrick*, 540 U.S. at 458 (citing *Carlisle*, 517 U.S. at 419–433 and *Robinson*, 361 U.S. at 222–230). Lambert relegates his discussion of *Robinson* and *Carlisle* to the back of his brief, but they are crucial to this case because they construed language nearly identical to Appellate Rule 26(b). Finding that "[t]here is simply no room in the text" for equitable exceptions, *Carlisle* held that Criminal Rule 45(b) barred an extension even where "the defendant was legally innocent" or the late

filing was a result of "attorney error." 517 U.S. at 421, 419. Likewise, *Robinson* held that Criminal Rule 45(b) precluded an extension for "excusable neglect." 361 U.S. at 221–22 & n.1, 229–30.

Lambert resists *Robinson* by questioning whether it "is still good law." Resp. Br. 44. But while this Court has disapproved of *Robinson*'s characterization of the deadline to file a notice of appeal as "jurisdictional," this Court has reaffirmed *Robinson*'s holding that Criminal Rule 45(b) is insusceptible to equitable exceptions. *Kontrick*, 540 U.S. at 548; *see also Eberhart v. United States*, 546 U.S. 12, 17 (2005) ("*Robinson* is correct . . . because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked.").

As for *Carlisle*, Lambert claims that the case "did not hold that Criminal Rule 45(b) 'precluded equitable exceptions.'" Resp. Br. 45. Yet the exceptions *Carlisle* rejected—*e.g.*, "legal innocence" or "attorney error," 517 U.S. at 420, 426—were plainly "equitable" in nature, as *Kontrick* confirms, 540 U.S. at 458 (citing *Carlisle* when discussing whether mandatory rules "can preclude equitable exceptions"). In fact, the district court excused Carlisle's failure to timely file a motion for judgment of acquittal because of the "grave injustice" that would result from enforcing the deadline where a defendant was legally innocent. *Carlisle*, 517 U.S. at 419.

The precedent discussed above stands for the simple proposition that judges do not have discretion to alter or ignore plain language in the federal rules. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) ("[F]ederal courts have no more discretion to

disregard [a federal rule] than they do to disregard constitutional or statutory provisions."). Lambert is wrong to suggest otherwise.

The purpose of a claim-processing rule is "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shineski*, 562 U.S. 428, 435 (2011). That purpose is best served when a rule is applied consistently and strictly according to its text. *See Carlisle*, 517 U.S. at 431 ("We see neither simplicity, nor fairness, nor elimination of delay in a regime that makes it discretionary whether an untimely [filing] will be entertained.").

This Court has therefore repeatedly held that claim-processing rules are "unalterable" and "mandatory" when they are properly invoked. *Manrique v. United States*, 137 S. Ct. 1266, 1274 (2017); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017); *Kontrick*, 540 U.S. at 456; *Eberhart*, 546 U.S. at 15.

III. THE RULE 23(f) DEADLINE IS INSUSCEPTIBLE TO EQUITABLE EXCEPTIONS

Just like Criminal Rule 45(b), the rules governing the time to file a Rule 23(f) petition—Rule 23(f) and Appellate Rules 5(a)(2), 26(b), and 2—create a strict and unyielding deadline that precludes equitable exceptions. Lambert's attempts to distinguish these rules and their purpose fail.

A. THE FEDERAL RULES PRECLUDE EQUITABLE EXCEPTIONS TO THE RULE 23(f) DEADLINE

The federal rules create a three-layered prohibition against untimely Rule 23(f) petitions. Pet. Br. 21–27.

First, Appellate Rule 5(a)(2) states that a Rule 23(f) petition "must" be filed within 14 days of an order granting or denying class certification. Fed. R. App. P. 5(a)(2).

Second, Appellate Rule 26(b) states that "the court may not extend the time to file . . . a petition for permission to appeal" under Rule 23(f). Fed. R. App. P. 26(b). That language is nearly identical to former Criminal Rule 45(b) that *Carlisle* and *Robinson* interpreted to preclude equitable exceptions. *See Robinson*, 361 U.S. at 223 ("[T]he court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal" (quoting Fed. R. Crim. P. 45(b)).[4] Indeed, this Court has already recognized that Appellate Rule 26(b), like Criminal Rule 45(b), is "not subject to equitable tolling." *Stone v. I.N.S.*, 514 U.S. 386, 405 (1995); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (explaining

[4] Both Appellate Rule 26(b) and Criminal Rule 45(b) are patterned on similar language in Rule 6(b), which courts had also defined as non-extendable before Appellate Rule 26(b) was adopted. *Kontrick*, 540 U.S. at 456 n.10; *Robinson*, 361 U.S. at 228–29.

that Appellate Rule 26(b) can withdraw a court's "broad equitable discretion").[5]

Third, Appellate Rule 2 specifically prohibits courts of appeals from suspending Appellate Rule 26(b)'s limitations. Fed. R. App. P. 2 ("[A] court of appeals may . . . suspend any provision of these rules . . . except as otherwise provided in Rule 26(b)."); *see also Torres*, 487 U.S. at 314–15 (applying Appellate Rule 2 to hold that Appellate Rule 26(b) is non-extendable).

Lambert responds to these bright-line rules by distorting them. He takes principal aim at Appellate Rule 26(b), claiming that it "simply prohibits a court from extending the time to file . . . based upon the forgiving good-cause standard," but does not prohibit "permitting a Rule 23(f) petition to be filed after the deadline expires." Resp. Br. 39. Yet these are two sides to the same coin: if a court can permit a late filing, Appellate Rule 26(b)'s prohibition on deadline extensions would be meaningless.

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[5] Lambert argues that this Court has applied equitable exceptions to "emphatic" language. Resp. Br. 34–35. But each case he cites involved a lone provision setting out a deadline, unlike the triple-layered proscription in Appellate Rules 26(b), 2, and 5(a)(2). For example, *United States v. Kwai Fun Wong* applied equitable tolling to a statute of limitations stating that untimely claims "shall be forever barred." 135 S. Ct. 1625, 1634 (2015). But that language was "commonplace in federal limitations statutes for many decades surrounding" enactment of the statute. *Id.* Nor did *Kwai Fun Wong* involve a provision like Appellate Rules 26(b)(2) or 2 that specifically denies a court's equitable discretion. Lambert's reliance on *Schacht v. United States* fails for the same reason. 398 U.S. 58, 64 (1970) (rejecting argument that the Court could not consider an untimely petition for a writ of certiorari because "Rule 22(2) contains no language that calls for so harsh an interpretation").

In any event, this Court already rejected Lambert's argument in *Robinson*. The version of Criminal Rule 45(b) at issue there allowed a court to "enlarge[]" a deadline or "permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect," but it prohibited the court from "enlarg[ing] . . . the period for taking an appeal." 361 U.S. at 223. Just like Lambert, the court of appeals believed that the "rule seems plainly to allow the District Court discretion to permit . . . a late notice of appeal" because doing so "would not be to 'enlarge' the period for taking an appeal, but rather would be only to 'permit the act to be done' after expiration of the specified period." *Id.*

This Court reversed, holding that "to recognize a late notice of appeal is actually to 'enlarge' the period for taking an appeal." *Id.* at 224; *see also Torres*, 487 U.S. at 315 (holding that "[p]ermitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal" in violation of Appellate Rules 26(b) and 2).

Furthermore, numerous courts of appeals have applied Appellate Rule 26(b) to reject Rule 23(f) petitions that were filed after the deadline expired. *Guttierez*, 523 F.3d at 193 n.5; *Eastman v. First Data Corp.*, 736 F.3d 675, 677 (3d Cir. 2013); *Delta Airlines v. Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004); *Fleischman*, 639 F.3d at 31.

Lambert also claims that "[f]orfeiture and waiver both involve a court overlooking a violation of a claim-processing rule." Resp. Br. 40. As an initial matter,

that argument ignores the "normal operation of our adversarial system," where "courts are generally limited to addressing the claims and arguments advanced by the parties." *Henderson*, 562 U.S. at 434. But in any event, this Court has made clear that claim-processing rules are "unalterable on a party's application." *Kontrick*, 540 U.S. at 456. And in this case, it is undisputed that Nutraceutical timely objected to Lambert's Rule 23(f) petition as untimely. *See* JA41, JA103. Accordingly, the Ninth Circuit had a duty to dismiss the appeal. *Manrique*, 137 S. Ct. at 1272.

B. LAMBERT'S RELIANCE ON OTHER FEDERAL RULES AND DOCTRINES IS MISPLACED

Seeking to avoid the dispositive impact of Appellate Rules 5(a)(2), 26(b), and 2, Lambert attempts to rely upon a series of other federal rules that are facially inapplicable.

For example, Lambert argues that Appellate Rule 3—which sets forth the procedure for filing a "notice of appeal" for appeals "as of right"—implicitly authorizes equitable exceptions to Rule 23(f). Fed. R. App. Proc. 3. Lambert claims "it is noteworthy that when Appellate Rule 3(a)(2) discusses missteps that can 'affect the validity of the appeal' it refers only to late-filed notices of appeal—and not petitions for permission to appeal." Resp. Br. 37.

But it's far from "noteworthy" that Appellate Rule 3 refers only to notices of appeal. Such notices are the entire subject of the rule. *See* Fed. R. App. P. 3. Nor is it surprising that "petitions for permission of appeal"

aren't mentioned in Appellate Rule 3, since such petitions are the subject of a different rule: Appellate Rule 5. Fed. R. App. Proc. 5; *see also Carlisle*, 517 U.S. at 442 (rejecting argument based on a facially unrelated federal rule).

Lambert also claims that Rule 23(f) must be subject to equitable exceptions because "a timely motion for reconsideration postpones the time for appeal." Resp. Br. 27. But that conclusion does not follow from the premise. Even *jurisdictional* deadlines—which are impervious to equitable exceptions—can be delayed pending a timely motion for reconsideration. *See Healy*, 376 U.S. at 77–79. That is because this exception is not an equitable exception at all, but rather "a well-established procedural rule for criminal, as well as civil, litigation." *Id.* at 80; *see also Ibarra*, 502 U.S. at 4 n.2 (noting that these circumstances do not involve "[p]rinciples of equitable tolling," but are "better described as [determining when the appeal period] began to run").

C. EQUITABLE EXCEPTIONS CONTRAVENE RULE 23(f)'s PURPOSE

Lambert next contends that "the purpose of Rule 23(f) confirms that tolling is available," because a Rule 23(f) petition "may be granted or denied on the basis of any consideration that the court of appeals finds persuasive." Resp. Br. 35 (quoting Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment).

To be sure, courts of appeals have discretion to accept or deny *timely* filed Rule 23(f) petitions based on their view of the merits, but Lambert's petition here was *untimely*. And Lambert does not and cannot cite

a single case to support his contention that Rule 23(f) gives courts of appeals discretion to grant untimely petitions.

Nor would any such rule make sense given that Rule 23(f) created a "deliberately small" 14-day filing window, *Gary*, 188 F.3d at 893, that is "designed to reduce the risk that attempted appeals will disrupt continuing proceedings," Fed. R. Civ. P. 23(f) advisory committee's note to 1998 amendment. Every other court of appeals to consider this issue has recognized that Rule 23(f)'s 14-day deadline is "strict and mandatory" in light of its purpose. *Gutierrez*, 523 F.3d at 199; *see also, e.g.*, *Gary*, 188 F.3d at 893 ("[T]o ensure that there is only one window of potential disruption, and to permit the parties to proceed in confidence about the scope and stakes of the case thereafter, the window of review is deliberately small."); *Jenkins*, 491 F.3d at 1290; *Fleischman*, 639 F.3d at 31.

IV. EVEN IF EQUITABLE EXCEPTIONS COULD APPLY, THE NINTH CIRCUIT'S DECISION BELOW WOULD STILL NEED TO BE REVERSED

Because the equitable exceptions the Ninth Circuit adopted are overly broad, unworkable and wholly inconsistent with the governing standards this Court has established, the decision below requires reversal even if equitable exceptions could apply to Rule 23(f).

A. WHETHER THE NINTH CIRCUIT ADOPTED AN ERRONEOUS EQUITABLE EXCEPTION IS PROPERLY BEFORE THIS COURT

Lambert's brief asserts numerous arguments that the Ninth Circuit did not adopt or even consider. *See supra* section I. Yet, in the same breath, Lambert accuses Nutraceutical of exceeding the question presented. Resp. Br. 52–54. This is clearly not the case.

Nutraceutical's argument is that the equitable exceptions the Ninth Circuit adopted are inconsistent with the standards set by this Court. *See* Pet. Br. 41. That is a legal issue—not a "factbound challenge," as Lambert asserts. Resp. Br. 54.

The issue is also "fairly included" within the question presented. Sup. Ct. R. 14(1)(a); *see also* Pet. Br. i. Whether the Ninth Circuit erred in adopting equitable exceptions to the Rule 23(f) deadline necessarily encompasses the subsidiary issue of whether the standard the court adopted is legally sound. *See Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978) (considering "subsidiary issues fairly comprised by the question presented" (citations omitted)); *United States v. Mendenhall*, 446 U.S. 544, 551–52 n.5 (1980) (same).

Still, even if this issue were outside the question presented, that would not preclude this Court's review. *Procunier*, 434 U.S. at 559 n.6 ("[O]ur power to decide is not limited by the precise terms of the question presented."). In circumstances similar to those here, this Court has exceeded the question presented to

determine whether the "record facts" justified equitable tolling. *Holland v. Florida*, 560 U.S. 631, 652 (2010); *see also* Brief for Petitioner, *Holland v. Florida*, 560 U.S. 631 (2010) (No. 09–5327), 2009 WL 5133492, at *i (setting forth a pure issue of law in the question presented).

B. THE NINTH CIRCUIT ADOPTED OVERLY BROAD AND IMPROPER EQUITABLE EXCEPTIONS

This Court has held that equitable exceptions may apply to untimely filings only "where the circumstances that caused a litigant's delay are both extraordinary *and* beyond its control," *Menominee Indian Tribe*, 136 S. Ct. at 756 (equitable tolling), or where the litigant relied on a court's mistaken albeit "specific assurance" of timeliness, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989) (unique circumstances doctrine). In other words, an external obstacle must have caused the litigant to miss the deadline.

The Ninth Circuit's standard contains no such requirement. *See Lambert*, 870 F.3d at 1178 (directing courts to consider "whether external circumstances, such as a deadline imposed by the district court, affected the litigant"). The decision below will therefore improperly provide relief to parties who were not misled or prevented from making a timely filing, but rather simply failed to follow applicable rules. This alone requires reversal. *See Menominee Indian Tribe*, 136 S. Ct. at 757 (rejecting equitable tolling where the "mistake was fundamentally no different from a garden variety claim of excusable neglect" (citation omitted)).

It is also precisely what happened here. It is undisputed that the District Court never told Lambert that his Rule 23(f) petition would be timely. Indeed, the District Court had no idea that Lambert was even considering filing an interlocutory appeal because Lambert never once mentioned an appeal or Rule 23(f) before he filed his petition. Pet. App. at 68–77.

Lambert's reliance on the unique circumstances doctrine, as applied in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) and *Thompson v. I.N.S.*, 375 U.S. 384 (1964), is misplaced. In stark contrast to the circumstances here, those cases arose under a federal rule (Rule 73(a)) that specifically *allowed* for extensions of time upon a demonstration of "excusable neglect." *Harris Truck Lines*, 371 U.S. at 216; *Thompson*, 375 U.S. at 387–88. By contrast, numerous federal rules expressly *prohibit* extending the Rule 23(f) deadline. *See* Fed. R. App. Proc. 2, 5(a)(2), 26(b).

Moreover, the unique circumstances doctrine has long been dormant and is inconsistent with the last several decades of this Court's jurisprudence. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (describing the doctrine's "40-year slumber"); *cf. Houston v. Lack*, 487 U.S. 266, 282 (1988) (Scalia, J., dissenting) (explaining that the Court's "later cases . . . effectively repudiate the *Harris Truck Lines* approach"). To the extent it should ever be revived, this is not the case.[6]

Here, just like in *Osterneck*, where this Court unanimously rejected the application of the unique

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[6] The Ninth Circuit made clear that it did not apply the unique circumstances doctrine below. *Lambert*, 870 F.3d at 1177 n.2.

circumstances doctrine, no court "ever affirmatively represented to [Lambert] that [his] appeal was timely filed, nor did [Lambert] ever seek such assurance from [a] court." 489 U.S. at 178–79 (citation omitted); *see also Gutierrez*, 523 F.3d at 198–99 (holding that where a district court "made no affirmative statements about the effect of the extension of time on Petitioners' ability to appeal [under Rule 23(f)]," the "unique circumstances doctrine provides no relief").

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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